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MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

JANUARY 31 TO MARCH 28, 1918

RICHARD W. COOPER
STATE REPORTER

VOL. 200

FIRST EDITION

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CALLAGHAN & COMPANY
1919

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JANUARY TERM, 1918.

HATCH *v.* WASHTENAW CIRCUIT JUDGE.

EXECUTION—STAY—MANDAMUS—BONDS—STATUTES.

Mandamus will not lie to compel a circuit judge to grant a stay of execution issued on a judgment rendered on November 2d, where the bond was not filed till December 5th following; section 23, chap. 22, of the judicature act (Act No. 314, Pub. Acts 1915, 3 Comp. Laws 1915, § 12812), requiring such bond to be filed within 20 days after the judgment is rendered.

Mandamus by William B. Hatch to compel Edward D. Kinne, circuit judge of Washtenaw county, to vacate an order denying a stay of execution. Submitted January 11, 1918. (Calendar No. 28,283½.) Writ denied January 31, 1918.

Hatch & Gillette, for relator.

PER CURIAM. November 2, 1917, the plaintiff obtained a judgment against the defendant in the circuit court. On December 5, 1917, an execution was issued thereon. December 5, 1917, the defendant filed a bond for the purpose of staying the execution and petitioned the court to recall the execution. This the court declined to do, and defendant asks for a writ of mandamus to compel him to do so, relying upon the case of *Peterson* v. *Wayne Circuit Judge,* 108 Mich. 608.

The statute calling for construction is Act No. 314, of the Public Acts of 1915, chap. 22, § 23 (3 Comp. Laws 1915, § 12812), and reads:

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"No stay of proceedings upon any verdict or judgment rendered in any circuit court in this State shall hereafter be granted or allowed for the purpose of moving for a new trial or settling a bill of exceptions * * * for a longer period than twenty days, unless the party applying for such stay, if judgment shall have been rendered against him, shall execute to the adverse party a bond," etc.

A reference to the case cited shows it is not controlling.

The language of the statute is not ambiguous. If the party seeking to appeal desired a stay of execution it was easy to get it by filing the requisite bond within the time fixed by the statute. Not having done so he is not entitled to have the execution recalled.

The application for the writ of mandamus is refused with costs.

DETROIT, TOLEDO & IRONTON RAILROAD CO. *v.* WESTERN UNION TELEGRAPH CO.

1. CONTRACTS—ASSIGNMENTS—PERSONAL CHARACTER.

An executory contract between a railway company and a telegraph company to jointly construct, maintain, and operate a telegraph line along the railroad right of way for a term of years, was not necessarily personal in its character and could, consistent with the rights of the telegraph company, be assigned by the railway company to its successor and be by it specifically enforced.

2. SAME — INSOLVENCY — LACK OF MUTUALITY — TERMINATION OF CONTRACT.

Where plaintiff went into possession of the railway prop-

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erty, which was sold under foreclosure proceeding in the Federal court, and began to operate it with the aid of the telegraphic system, promptly electing to be bound by the terms of said contract, there was no lack of mutuality, although the Federal court gave plaintiff 90 days in which to disavow any contract of its predecessor.

3. SAME — INSOLVENCY — LACK OF MUTUALITY — TERMINATION OF CONTRACT—ESTOPPEL.

It would be inequitable to permit defendant to terminate said contract on the ground of lack of mutuality because of the insolvency of plaintiff's predecessor, and its passing into the hands of a receiver, where said question was not raised during the six years of the receivership, and not until after the mutuality had been restored by the substitution of a responsible party.

4. MORTGAGES—FORECLOSURE—CONTRACT RIGHTS.

Rights in property which are acquired subsequent to the attaching of a mortgage lien are extinguished by the foreclosure and sale of the mortgaged property; there being no privity of contract between the holder of the rights subsequently acquired and the purchaser.

5. CONTRACTS—SALE OF ASSETS—TRANSFER OF CONTRACT RIGHTS.

Where the decree of the Federal court contemplated that the interest of the mortgagee, the receiver, and the railway company should pass to the purchaser, and in pursuance thereof the transfers were executed by the master in chancery, the receiver, and the mortgagor railway company, the rights of said railway company in said contract which had passed to the receiver, were transferred to plaintiff, and are enforceable by a court of equity.

Appeal from Wayne; Sullivan, J., presiding. Submitted June 18, 1917. (Docket No. 38.) Decided February 19, 1918.

Bill by the Detroit, Toledo & Ironton Railroad Company against the Western Union Telegraph Company for the specific performance of a contract. From a decree for plaintiff, defendant appeals. Affirmed.

Stevenson, Carpenter, Butzel & Backus (*Samuel R. Williams*, of counsel), for plaintiff.

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Corliss, Leete & Moody (*Albert T. Benedict*, of counsel), for defendant.

BIRD, J. The Detroit, Toledo & Ironton Railway Company, the predecessor of plaintiff, entered into a contract with defendant on the 29th day of August, 1906, which had for its object the construction, maintenance, and operation of a telegraph line along the right of way of the railway extending from the city of Detroit to Ironton on the Ohio river. In substance, this contract required the defendant telegraph company to furnish the poles, wire, and other materials for the construction of the line, and a foreman to direct its construction. It made it incumbent on the railway company to grant an easement over its right of way for the line, and to furnish the labor to construct, maintain, and operate the same, and to furnish office room at the several stations in which to operate the system. The contract is specific as to what each party shall furnish, pay for and receive, but we think it unnecessary to recite them in detail. The contract was to continue for a period of 25 years and longer unless one of the parties gave notice to terminate it. In pursuance of this contract the work was done and the line operated. So far as the record shows the parties worked in harmony under the contract, and the railway expended upwards of $20,000 in discharging its obligations thereunder. In the year 1908 the railway found its way into the hands of a receiver by reason of the foreclosure of certain mortgages on its property. The receivership lasted about six years, during which time the receiver operated the railway and telegraph system and discharged the contract obligations of the railway company. At the expiration of this period the property was sold under the direction of the Federal court and purchased by plaintiff in March, 1914. Soon after taking possession thereof

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plaintiff was notified by defendant that it elected to terminate the contract on account of the foreclosure proceedings, and threatened to discontinue service and remove its line. To prevent defendant from carrying its threats into execution plaintiff filed this bill. At the hearing on the merits the trial court granted the relief prayed for in the bill, and defendant has appealed.

Plaintiff takes the position that the contract was a valid one, that the Detroit, Toledo & Ironton Railway Company had an enforceable interest therein, and that, having assigned that interest to plaintiff, it can now be enforced in its behalf. The defendant contends that the contract was not assignable, that when plaintiff took possession of the railroad property by virtue of the foreclosure proceedings, the contract was at an end and afterward neither party could enforce it against the other. These contentions appear to raise the following questions:

(1) Was the contract assignable?

(2) Was the contract assigned?

1. The test of the assignability of an executory contract is laid down in *Northwestern Cooperage & Lumber Co.* v. *Byers*, 133 Mich. 534, as follows:

> "That where an executory contract is not necessarily personal in its character, and can, consistent with the rights and interests of the adverse party, be fairly and sufficiently executed as well by the assignee as by the original contractor, and when the latter has not disqualified himself for the performance of the contract, it is assignable."

This rule was followed in the recent cases of *Voigt* v. *Heating Co.*, 164 Mich. 539, and the *C. H. Little Co.* v. *Transit Co.*, 197 Mich. 481.

Applying this test to the contract under consideration, we find no difficulty in concluding that it falls within the class of contracts which are assignable.

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The so-called personal element which enters into it is very small. It is hardly conceivable that the particular corporation which happened to own the railway property at the time, or the personnel of its official force, influenced the defendant in any great degree to enter into the contract. We think it was rather the fact that the company owned a line of railway, had a right of way which extended from the city of Detroit to the Ohio river, and the density of population and traffic through which it passed, that moved the defendant to make the contract. It is difficult to suggest any reason why it should have refrained from entering into the contract had some other railway corporation owned the property. The contract was made to supply an essential element in the operation of the railroad and to aid defendant in extending its commercial telegraphic service into new territory. Counsel say that the personal element manifests itself in that part of the contract which makes the employees of the railway custodian of the funds received for the transmission of commercial messages. While a custodian of money involves a position of trust, and ordinarily would indicate a selection based on the honesty and responsibility of the custodian, it is not of much force in the present case as the contract does not appear to have been made by defendant with reference to any particular employee or employees who had been or would be employed by the railway company. It had reference to the railway employees generally whose positions were subject to change. We think the contract was one which could be complied with as well by plaintiff as by its grantor because it had title to the railway property and therefore had it within its power to comply with its terms.

While the railway company became unable to carry out its contract on account of insolvency, its obligations thereunder appear to have been discharged by

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the receiver and no attempt was made by defendant to put an end to the contract during the period of receivership, nor did defendant attempt to take advantage of any right it may have had to terminate the contract until after the sale and the property had passed into the possession of plaintiff, a responsible party, against which the contract could be enforced. But it is argued that because the decree of the Federal court gave plaintiff 90 days in which to disavow contracts made by its predecessor, a period was thereby created in which defendant could not have enforced the contract, and in consequence thereof its mutuality passed out of it. While the decree gave to plaintiff this privilege it did not exercise it after the position of defendant was called to its attention, but instead it promptly elected to be bound by the terms of the contract. We think it is not going too far to hold that when plaintiff went into possession of the railway property and began to operate it with the aid of the telegraphic system without which aid it could not have been operated, it thereby elected to be bound by the contract. But aside from this consideration, it would be inequitable to permit defendant to avoid the contract because of a lack of mutuality when it did not raise the question until after its mutuality had been restored by the substitution of a responsible party.

2. Did the railway's interest in the contract pass to plaintiff? The contract with plaintiff's predecessor was made subsequent to the mortgages which underwent foreclosure. We do not understand that it is contended that the rights of the railway in its contract were covered by the lien of the mortgages as after-acquired property. The decree of the Federal court providing for the sale and transfer, as well as the deeds and bills of sale transferring the same, contemplated that the interest of the mortgagee, of the

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receiver, and of the railway company should pass to the purchaser, and in pursuance of the request of the purchasers the transfers were executed by the master in chancery, by the mortgagees, by the receiver, and by the mortgagor railway company. If the railway's interest in the contract was not covered by the mortgage it must have been an asset of the company which passed to the custody of the receiver and from him and the railway company to plaintiff under the deeds and bills of sale. But defendant contends that there was nothing to transfer, that the contract rights were extinguished by the foreclosure sale of the property, and in support of this contention much reliance is placed upon the case of *Western Union Telegraph Co.* v. *Ann Arbor R. Co.*, 90 Fed. 379. This case was afterwards reversed by the Supreme Court on jurisdictional grounds (178 U. S. 239). But we think the opinion of the court of appeals may be accepted as good law. It goes no farther than to restate the rule that rights in property which are acquired subsequent to the attaching of a mortgage lien are extinguished by the foreclosure and sale of the mortgaged property, the reason being that there is no privity of contract between the holder of the rights subsequently acquired and the purchaser. Had plaintiff's interest in the property been confined to the interest of the mortgagees which it acquired as purchaser at the foreclosure sale, the case would then be the same as the one cited. But the plaintiff acquired something in addition to that interest. It acquired the railway's interest in the contract. Having thus acquired the mortgagee's interest in the property and the railway's interest in the contract, it stood in the same relation to the contract that its predecessor did. It seems to me that plaintiff was in the same position as though it had, before the receivership, purchased the interest of the mortgagees and the interest of the railway

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company. Had it done so, under our view that the contract is assignable, it cannot be questioned that plaintiff would have had an enforceable interest in the contract. Suppose the position of the parties were reversed and plaintiff was attempting to terminate the contract after having taken an assignment thereof from the railway company and after having purchased the railway property at the mortgage sale, and entered upon the operation of the railway property and telegraphic system, could the railway company succeed in its attempt by claiming it was not bound by the contract? We think not. Our conclusion is that plaintiff has an enforceable interest in the contract which was properly enforced by the decree of the trial court.

The decree will be affirmed.

OSTRANDER, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

MINTZ *v.* SOULE.

DISMISSAL AND NONSUIT—COMMON LAW RIGHT OF NONSUIT—STATUTES—LEGISLATIVE INTENT—CONSTRUCTION.

Act No. 200, Pub. Acts 1915, 3 Comp. Laws 1915, § 14566, providing that whenever the defendant in any civil action shall have entered upon his defense in open court, the plaintiff shall not be allowed to discontinue or submit to nonsuit without defendant's consent, construed, and *held*, to be the legislative intent that the act was not to affect the common law right of a plaintiff to submit to a nonsuit at any time before verdict is rendered in a case where no witnesses were procured, no defense made on

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the facts, and only legal questions were raised, but was to apply where defendant had been to the expense and trouble of procuring witnesses, and had entered upon his defense in open court upon the merits.

Error to Wayne; Gage, J., presiding. Submitted June 22, 1917. (Docket No. 125.) Decided February 19, 1918.

Assumpsit by Samuel Mintz against Elmer F. Soule and others upon an appeal bond. Judgment of nonsuit for plaintiff. Defendants bring error. Affirmed.

Dingeman & Schueler, for appellants.

William Henry Gallagher and *Francis T. McGann*, for appellee.

FELLOWS, J. This action is brought by plaintiff on the appeal bond given in the case of *Mintz* v. *Soule*, 182 Mich. 564.

Upon the trial in the circuit court the plaintiff introduced his proofs and rested. Defendants offered no testimony, but, having rested, made a motion for a directed verdict. This motion was argued, but before it had been finally decided plaintiff asked for a continuance, which was denied; he then asked leave to submit to a nonsuit, which was likewise denied, and a verdict for defendants was directed. Thereafter plaintiff made a motion for a new trial, which was refused. He then made a motion for the vacation of the judgment and for a judgment of nonsuit, which motion was granted, and defendants bring the case here. The trial court reached this conclusion upon the theory that the defendants had not entered upon their defense in open court within the meaning of Act No. 200, Pub. Acts 1915 (3 Comp. Laws 1915, §§ 14566, 14567).

While I entertain doubt as to the correctness of the

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trial court's construction of this act, my brethren are all agreed that he reached the correct result; that the statute in question was designed to prevent a plaintiff from discontinuing his suit or submitting to a nonsuit without the consent of the defendant, where the defendant, who had been to the expense and trouble of procuring witnesses, had entered upon his defense in open court by putting in his testimony upon the merits, and that the act was not intended to apply to those cases where no witnesses were procured, no defense made on the facts, and only legal questions are raised. At common law the plaintiff might submit to a nonsuit at any time before verdict. *Deneen* v. *Railway Co.*, 150 Mich. 235; *Davis* v. *Railway*, 162 Mich. 240. This practice has been sanctioned by long usage and is a protection against defeat through surprise and disappointment in proofs. This court entertains the view that it was not the legislative intent to modify this practice so long in vogue except as herein pointed out. It follows that the judgment of nonsuit is affirmed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred.

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CAREY *v.* GRAND TRUNK WESTERN RAILWAY CO.

1. INTERSTATE COMMERCE — MASTER AND SERVANT — FEDERAL EMPLOYERS' LIABILITY ACT—RAILROADS—JURISDICTION.
   The decision of the Supreme Court of the United States that the entire subject of the liability of interstate railway carriers for the death or injury of their employees while employed in interstate commerce is completely covered by the Federal employers' liability act (35 U. S. Stat. 65) is controlling in Michigan, rendering inapplicable the provisions of the Michigan workmen's compensation act in such cases. *New York Cent. R. Co.* v. *Winfield*, 244 U. S. 147.

2. MASTER AND SERVANT — WORKMEN'S COMPENSATION LAW — ACCEPTANCE OF ACT—INTRASTATE COMMERCE.
   Where claimant's husband, a conductor, was accidentally killed while in charge of a freight train composed exclusively of cars containing interstate shipments, an award of compensation under the Michigan workmen's compensation law was unauthorized, the Federal employers' liability act (35 U. S. Stat. 65) having exclusive jurisdiction, notwithstanding defendant railroad company had filed its acceptance of the Michigan act, since it would apply to cases arising in intrastate commerce only; defendant being engaged in both interstate and intrastate commerce.

Certiorari to Industrial Accident Board. Submitted October 16, 1917. (Docket No. 154.) Decided February 19, 1918.

Anna Carey presented her claim for compensation against the Grand Trunk Western Railway Company for the accidental death of her husband in defendant's employ. From an order awarding compensation, defendant brings certiorari. Reversed.

W. A. Geer and *R. R. Weaver* (*H. Geer* and *W. K. Williams*, of counsel), for appellant.

John B. McIlwain, for appellee.

STONE, J. This case is before this court upon certiorari to the industrial accident board. The record contains the proceedings had before the committee on

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arbitration, and an appeal from its decision to the industrial accident board.

The defendant and appellant is a common carrier railroad corporation, engaged in the business of intrastate and interstate commerce in this State and elsewhere. On July 11, 1916, Timothy J. Carey, while in the service of said railway company as conductor of a freight train, composed exclusively of cars containing interstate shipments, consisting of freight from Chicago and elsewhere outside of this State, to points within and beyond this State, and consignments received at various points in Michigan, and destined for points beyond its boundaries, sustained an injury by tripping and falling over a semaphore wire, strung along the railroad track at the Lansing, Mich., station, from which injuries it was claimed that consequences developed causing his death on November 9th following.

The appellant in September, 1912, had filed with the industrial accident board of Michigan a written statement to the effect that it elected to accept the provisions of the Michigan compensation act, which was approved by the board, and the company was permitted to carry its own risk. After the death of Mr. Carey, his widow, Anna Carey, presented a claim against the railway company, seeking an adjustment of the matter according to the terms of the Michigan workmen's compensation act. The appellant declined in writing to settle the claim as presented, upon the ground that Mr. Carey, at the time of the accident, was engaged in interstate commerce. The plaintiff thereupon filed an application for adjustment of claim, and a hearing was had before an arbitration committee under the said act. The evidence introduced by both parties disclosed that Mr. Carey, and the railway train upon which he was employed as conductor at the time of the accident, were engaged in interstate

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commerce. The committee awarded compensation, and an appeal was taken to the board, which found that Mr. Carey was engaged in interstate commerce at the time of the accident, and further that the award of the committee on arbitration should be affirmed, and entered an order accordingly.

In this court appellant relied upon the proposition that the accident upon which plaintiff's claim is based did not occur within the jurisdiction covered by the Michigan compensation act, and the question is raised by proper assignments of error. It is urged by appellant that the Michigan workmen's compensation act, by its own terms, expressly excludes cases of this nature from adjudication by the industrial accident board. Section 4, pt. 6, of Act No. 10, Extra Session 1912 (2 Comp. Laws 1915, § 5491), reads as follows:

"The provisions of this act shall apply to employers and workmen engaged in intrastate commerce, and also to those engaged in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that any such employer and any of his workmen working only in this State, may, subject to the approval of the industrial accident board, and so far as not forbidden by any act of congress, voluntarily accept and become bound by the provisions of this act in like manner and with the same force and effect in all respects as is hereinbefore provided for other employers and their workmen."

It is also urged by appellant that this record fails to disclose the existence of a contractual obligation purporting to require adjustment of the present claim upon the basis of the Michigan act, but that, did one exist, it would be quite unenforceable, as opposed to all the principles announced by the Federal decisions,

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and the following cases are cited: *Grand Trunk R. Co.* v. *Knapp,* 233 Fed. 950; *Waters* v. *Guile,* 234 Fed. 532; *New York Cent. R. Co.* v. *Winfield,* 244 U. S. 147 (Am. & Eng. Ann. Cas. 1917D, 1139); *Erie R. Co.* v. *Winfield,* 244 U. S. 170. In the *Knapp Case* Judge Knappen, referring to the section of the Michigan statute above quoted, said:

"By section 4, part 6, of the act, its provisions are made to apply to employers and workmen engaged in intrastate commerce, but not to those engaged in interstate commerce, 'for whom a rule of liability or method of compensation has been or may be established by the congress of the United States,' except to the extent that 'their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce.' There is also provision for express and voluntary acceptance of the act by 'any such employer and any of his workmen working only in this State,' if done with the approval of the industrial accident board."

The position of the plaintiff is stated in the supplemental brief of her counsel as follows:

"At the time the workmen's compensation act was passed the Federal employers' liability act had been in force four years, by which the employer was liable to the employee in an action at law for all injuries received in the line of employment as the result of negligence chargeable to the employer, and in which the common-law defenses of fellow servant, contributory negligence and assumption of risk were taken away. Under this act, however, negligence was essential to recover, and in all cases where negligence could not be shown the employee was without remedy. This was not deemed a sufficient measure of justice to employees. The unquestioned intent and purpose of the legislature in enacting the workmen's compensation law was to provide a remedy for all injured employees, which legislation was prompted by a universal public demand that such a measure of compensation should be provided, and the cost of it should be borne by the employer the same as any other expense incurred in carrying on his business. Congress had taken a step

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in that direction, but it was restricted and inadequate. With the intent and purpose of providing moderate compensation for all injured employees the workmen's compensation law was enacted leaving it optional, however, with the employer to accept or reject its provisions as he saw fit. The liability of the employer under the Federal act was then an existing remedy for a limited class of cases, but one over which the legislature had no power, or control whatsoever. Any legislation enacted by the State must be in subordination to it."

In our opinion the question before us is settled by *New York Cent. R. Co.* v. *Winfield, supra,* unless a distinction can be made between the New York workmen's compensation act (Consol. Laws, chap. 67) and ours. In that case the United States Supreme Court held that the entire subject of the liability of interstate railway carriers, for the death or injury of their employees, while employed by them in interstate commerce, is so completely covered by the provisions of the Federal employers' liability act of April 22, 1908, as to prevent any award under the New York workmen's compensation act, where an employee was injured or killed without fault on the railway's part, while he was engaged in interstate commerce, although the Federal act gives the right of recovery only, when the injury results in whole or in part from negligence attributable to the carrier. In other words, it was there held that by the Federal act, congress manifested its will to cover the whole field of compensation or relief for injuries suffered by railroad employees engaged in interstate commerce, or at least the whole field of obligation of carriers relating thereto; and that it thereby withdrew the subject wholly from the domain of State action.

The doctrine announced is that by the Federal legislation employees of an interstate railroad company are not within the purview of a State workmen's com-

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pensation act. This doctrine is reiterated in the *Erie R. Co. Case.* There the New Jersey statute was under consideration. The question presented included whether, by reason of the State statute, the carrier became bound contractually to make compensation, even though it came within the Federal act. Speaking of that statute the court said:

"Unless * * * a notice from one party to the other contain 'an express agreement in writing,' to the contrary, it 'shall be presumed' that the parties 'have agreed to be bound' by this part of the statute. There was no express agreement in this instance and there is no basis for regarding the carrier as in any way bound by this part of the statute save as it provides that an agreement to be bound by it shall be presumed in the absence of a declaration to the contrary. But such a presumption cannot be indulged here, and this for the reason that by the Federal act the entire subject, as respects carriers by railroad and their employees in interstate commerce, was taken without the reach of State laws. It is beyond the power of any State to interfere with the operation of that act, either by putting the carriers and their employees to an election between its provisions and those of a State statute, or by imputing such an election to them by means of a statutory presumption."

But it is said that the workmen's compensation act of New York, being compulsory upon the employer, renders the *Winfield Cases* inapplicable here. We are unable to agree with this contention. The Michigan act applies to intrastate transportation. It was not therefore inconsistent with its present contention for the Grand Trunk Western Railway Company to accept the provisions of the Michigan compensation act. Many cases might arise in intrastate business where the workmen's compensation act would apply. *New York Cent. R. Co.* v. *White*, 243 U S. 188 (L. R. A. 1917D, 1 Am. & Eng. Ann. Cas. 1917D, 629), was such a case. There it was held that White was en-

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gaged in intrastate commerce. It was said that the test was:

"Was the employee at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?"

And that question was answered in the negative, and the State board's award was affirmed.

In *New York Cent. R. Co.* v. *Winfield, supra,* Justice Brandeis, in an exhaustive dissenting opinion, covers the field of police regulation. We speak of this to show that the whole subject was before the court and was considered in all aspects. The doctrine of the majority opinion is that the action of congress was paramount and exclusive of State action. We call attention to the phrase, "and so far as not forbidden by any act of congress," contained in section 4 of the Michigan act, above quoted. May it not be said that congress by occupying the field by its legislation has thereby forbidden the States to legislate upon the subject? In the language of Justice Van Devanter:

"In such a case, the legislation of congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it."

In this view there is no conflict between the State and Federal legislation; and we can agree with counsel for the plaintiff that:

"The whole scheme of the workmen's compensation act discloses an intent on the part of the legislature to avoid invasion of the Federal jurisdiction or any conflict with the Federal law, and to keep within the scope of legislative authority. And it must be presumed that the legislature did not intend by the language used to abrogate, nullify, suspend, or to in any manner interfere with the liability created by the Fed-

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eral law. It must be presumed it did not intend to do that which it had no authority to do."

This court has spoken upon the general proposition that the Federal employers' liability act is exclusive and paramount in regulating the relations of employers and employees engaged in interstate commerce. *Fernette* v. *Railroad Co.*, 175 Mich. 653, 674; *Gaines* v. *Railway Co.*, 181 Mich. 376; *Holmberg* v. *Railway Co.*, 188 Mich. 605. In our opinion the *Winfield Cases* are as controlling under the Michigan workmen's compensation act as under the New York act, and that they settle conclusively for all American jurisdictions the question that employees of an interstate carrier, engaged in interstate business, are not within the jurisdiction of the State workmen's compensation acts.

It follows that the order of the industrial accident board must be reversed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

WILLIS *v.* OSCAR DANIELS CO.

1. MASTER AND SERVANT—DEATH—MASTER'S LIABILITY—ASSUMPTION OF RISK—COMMON LAW.

   Where a carpenter, who had charge of the crew of men engaged in putting up and taking down forms in which concrete was poured, and who saw, or could have seen, in the exercise of ordinary care, just what the situation was, was killed by a fall, there could be no recovery from the master under the common law.

2. SAME—WORKMEN'S COMPENSATION LAW—APPLICABILITY — COMMON-LAW DEFENSES—ACTIONABLE NEGLIGENCE.

   Whether the workmen's compensation law (Act No. 10, Extra Session 1912, 2 Comp. Laws 1915, § 5423 *et seq.*) is

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applicable or not, before a master, who has not signified his intention of coming under the provisions of the law, can be held liable for the accidental death of a servant in his employ, actionable negligence on the part of the master must be proven.

3. CONSTITUTIONAL LAW—MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—JURISDICTION OF STATE OVER LAND CEDED TO UNITED STATES.

Although section 1, art. 1, of the Constitution of Michigan, declares the State has jurisdiction over the territory embraced within its boundaries, described therein, land ceded by Act No. 17, Pub. Acts 1881, to the United States for St. Mary's Falls ship canal, lying within said boundaries, reserving to the State only the right to serve process in civil and criminal actions, is not subject to the operation of the State workmen's compensation act, passed in 1912 (Act No. 10, Extra Session 1912, 2 Comp. Laws 1915, § 5423).

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—JURISDICTION—STATUTES—PROVISO—CONSTRUCTION.

The proviso in Act No. 17, Pub. Acts 1881, ceding to the United States land for St. Mary's Falls ship canal, *held*, to be for the purpose of providing that there should be no neutral territory where civil and criminal process might not be served, and is no authority for the contention that, in the absence of legislation upon the subject by congress, the legislature of Michigan might legislate upon the subject of employers and employed, rendering the provisions of the workmen's compensation law operative over the ceded lands.

Error to Chippewa; Fead, J. Submitted October 3, 1917. (Docket No. 4.) Decided February 23, 1918.

Case by Flora Willis, administratrix of the estate of John Willis, deceased, against the Oscar Daniels Company for the negligent killing of plaintiff's intestate. Judgment for defendant *non obstante veredicto*. Plaintiff brings error. Affirmed.

McDonald & Kaltz, for appellant.

Davidson & Hudson, for appellees.

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MOORE, J. This case is brought to recover damages for the death of the husband of the plaintiff. He was employed by defendant from the last of July, 1915, to October 20, 1915, when he was instantly killed by a fall. Defendant was engaged on a construction contract for the United States government in connection with St. Mary's Falls ship canal. It was conceded the injury occurred on lands belonging to the United States government and included in the strip of land described in Act No. 17, Public Acts of Michigan for 1881.

At the close of plaintiff's case defendant moved for a directed verdict, which motion was overruled. This motion was renewed at the close of the testimony and the motion was reserved under the statute. The case was submitted to the jury and a verdict rendered for the plaintiff in the sum of $3,600.

In disposing of the motion reserved the trial judge filed a written opinion from which we freely quote:

"The question was reserved under Act No. 217, Pub. Acts 1915 (3 Comp. Laws 1915, § 14568), the cause was submitted to the jury upon the theory that the common-law defenses were not available to defendant because of the provisions of the workmen's compensation act (Act No. 10, Extra Session 1912, 2 Comp. Laws 1915, § 5423 *et seq.*), and the plaintiff had verdict.

"The question reserved depends upon the determination of what was in force at the place of the injury. The defendant was engaged in cement construction work, under contract with the United States, on the fourth lock of the St. Mary's Falls ship canal at Sault Ste. Marie. It was conceded that the injury occurred on lands belonging to the United States government by cession from the State of Michigan to the United States under the provisions of Act No. 17 of the Public Acts of 1881. * * *

"The St. Mary's Falls ship canal was for many years immediately succeeding the admission of Michigan as a State, a source of considerable controversy between

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the State and National governments. The State always viewed the project as of national importance and concern and consistently and persistently sought to induce the general government to build the canal or to defray the cost thereof. After many failures, the efforts of the State finally met with success and in 1852 congress granted to the State the right of

"'Locating a canal through the public lands, known as the military reservation at the falls at Saint Mary's River in said State; and that four hundred feet of land in width extending along the line of such canal be, and the same is hereby granted, to be used by said State, or under the authority thereof, for the construction and convenience of such canal, and the appurtenances thereto, and the use thereof is hereby vested in said State forever, for the purposes aforesaid, and no other.'

"To cover the cost of construction, congress granted to the State 750,000 acres of the public lands. 10 Stat. at Large, 35, chap. 92.

"This grant was accepted by the State with all its conditions and restrictions on February 5, 1853. Act No. 38, Laws 1853. The construction of the canal was provided for by the same act and it was finally completed. * * *

"By Act No. 39, Laws 1873, it was provided:

"'That the jurisdiction of this State is hereby ceded to the United States of America over all such pieces or parcels of land as are required and selected by the United States for the enlargement and improvement of the Saint Mary's Falls ship canal. * * *

"'And this cession is upon the express condition that the State of Michigan shall so far retain jurisdiction with the United States in and over the tracts aforesaid, that all civil and criminal process issued under the authority of this State, or any officer thereof, may be executed on said lands, and in the buildings that may be erected thereon, in the same manner as if jurisdiction had not been ceded as aforesaid; and all crimes committed on said territory shall be cognizant by the State courts as though this act had not been made.'

"The financial condition of that part of the canal under the control of the State having finally become satisfactory, congress authorized the secretary of war to accept on behalf of the United States from the

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State, the Saint Mary's canal and the public works thereon; whereupon the State authorized the board of control of the canal to transfer the 'canal and public works thereon, with all its appurtenances and all the right and title of the State of Michigan in and to the same, to the United States in accordance with' the provisions of the act of congress authorizing the secretary of war to accept the same. The cession was upon the express condition:

"'That the State of Michigan shall so far retain concurrent jurisdiction with the United States over the Saint Mary's Falls ship canal, and in and over all lands acquired, or hereafter acquired, for its use; that all civil or criminal process issued by any court of competent jurisdiction, or officers having authority of law to issue such process, and all orders made by such court, or any judicial officer duly empowered to make such orders, and necessary to be served upon any such person, may be executed upon said Saint Mary's Falls ship canal, its lands, and in the buildings that may be erected thereon, in the same way and manner as if jurisdiction had not been ceded as aforesaid.' Act No. 17, Pub. Acts 1881.

"It appears that the State was not the fee owner of the premises upon which the canal was constructed but had only a defeasible title to a right of way. Prior to the grant of 1853 the National government had set the land apart for public purposes as a military reservation and had contested the right of the State to even cross the reserve without permission. It was 'supposed to be withdrawn from plenary local jurisdiction.' *Ryan* v. *Brown,* 18 Mich. 207. The grant of the right of way established the jurisdiction of the State over the premises but the claims which had been made may possibly account for the restricted reservation of jurisdiction upon the cession of the canal back to the United States in 1881.

"The specific question to be determined is whether the cession by the State to the United States under the act of 1881 vested the civil jurisdiction in the United States or whether it still rests in the State. If jurisdiction is still in the State, the compensation law of 1912 is in effect over the premises and the defendant is not entitled to maintain the common-law defenses. If jurisdiction is in the United States, those defenses

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are open to it, and, under the proofs, would require the entry of a judgment *non obstante veredicto.*

"By Art. 1, Sec. 8, subd. 17, of the Constitution of the United States, congress is given power

"'To exercise exclusive legislation in all cases whatsoever over such district * * * as may * * * become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings.'

"The mere citation of this provision does not settle the question. * * *

"The rights of the respective governments must depend upon the effect of the statutes by which the State ceded the land and jurisdiction to the United States. In this connection counsel for plaintiff contends that jurisdiction was not acquired by the United States because the cession of the canal was not for a purpose within the specified purposes of the Constitution; citing *Mayor, etc., of New Orleans* v. *United States,* 10 Pet. (35 U. S.) 662, 737, where the court used this language:

"'Special provision is made in the Constitution for cession of jurisdiction from the States over places where the Federal government shall establish forts and other military works. And it is only in these places, or in the Territories of the United States, where it can exercise a general jurisdiction.'

"The later cases and the contemporaneous construction of the constitutional provision by the legislature of the States do not sustain the *dicta* above quoted that the jurisdiction of the United States can obtain only in forts and other military works and in Territories; nor do they sustain the contention of plaintiff's counsel that a basic distinction is drawn in the Constitution between lands devoted to the 'private' purposes of the government, such as forts, arsenals, etc., and those devoted to its 'public' purposes and used for the benefit of the general people, such as canals; and that in the latter exclusive jurisdiction cannot be vested in the United States. The general term, 'other needful buildings,' following the specific words, 'forts, magazines, arsenals, dock yards,' has not been given

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the restricted construction usually applicable to statutes, that general words following specific words are confined to the same class as those specifically set up.

"Exclusive jurisdiction under proper cession, has been sustained in the following instances: A National home for disabled volunteer soldiers, *Foley* v. *Shriver*, 81 Va. 573; *Sinks* v. *Reese*, 19 Ohio St. 306; postoffices and Federal court houses, *State* v. *Mack*, 23 Nev. 365; customs houses, *Sauer* v. *Steinbauer*, 14 Wis. 70; cemeteries, *Wills* v. *State*, 50 Tenn. 141.

"The legislature of this State has many times indicated its understanding of the purposes for which exclusive jurisdiction may be ceded to the Federal government. Thus, usually with the reservation of jurisdiction to serve process and sometimes with a reservation of criminal jurisdiction, the State has ceded jurisdiction to the United States in the following instances, * * * and, as allied with the canal in question, over lands of the Hay Lake channel in St. Mary's River, Act No. 104, Pub. Acts 1889; and numerous other lands, note to 4 How. Stat. (2d Ed.) § 10151.

"The term 'other needful buildings' as used in the Constitution, has thus been given a broad rather than a restricted interpretation by the courts and our legislature. * * *

"No court of last resort seems to have passed upon the precise question here involved but the only judicial authority cited held that canal locks and dams are within the meaning of the constitutional term 'needful buildings.' *United States* v. *Tucker*, 122 Fed. 518.

"In view of the unanimity of the legislative and judicial authority it must be held that the St. Mary's Falls ship canal is property over which the State may cede and the United States acquire and exercise exclusive legislative jurisdiction. * * *

"In the Act No. 17, Pub. Acts 1881, instead of retaining concurrent general jurisdiction, as claimed by plaintiff, the State retained concurrent jurisdiction only in so far that civil or criminal process or court orders may be executed upon the canal lands in the buildings thereon in the same way and manner as if jurisdiction had not been ceded. This condition and reservation have no effect upon the cession of legislative authority and do not reserve to the State any

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jurisdiction other than to serve its process on the lands. * * *

"It is further contended that the laws of the State of Michigan continue to operate over the ceded territory inasmuch as congress has passed no further law extinguishing the State's authority. Were the workmen's compensation law in effect at the time of the cession of the canal in 1881, that law would undoubtedly govern the liability of the master for torts done to the servant upon such premises so long as congress did not take action. Laws in force in ceded territory continue in force until changed by the new sovereign. *Chicago, etc., R. Co.* v. *McGlinn,* 114 U. S. 542; *Barrett* v. *Palmer,* 135 N. Y. 336 (17 L. R. A. 720); *American Ins. Co.* v. *Canter,* 1 Pet. (26 U. S.) 511.

"These decisions, however, do not sustain the proposition that statutes taking effect after the cession will be in force in the ceded territory. *Crook* v. *Hotel Co.,* 54 Fed. 604. * * *

"In the case at bar, the question is not one of power over subjects or departments of legislation but is one of territorial jurisdiction. After the cession of property and jurisdiction over it, that property is not a part of the State nor subject to its laws. The same contentions here made were urged in the case of *Western Union Tel. Co.* v. *Chiles,* 214 U. S. 274, where it was held that a statute of Virginia imposing a penalty for the nondelivery of a telegram had no force within the limits of the Norfolk navy yard, jurisdiction over which had been ceded to the United States prior to the enactment of the law imposing the penalty. This case, moreover, disposes of plaintiff's contentions regarding the United States not being interested in the present litigation and that the operation of the State law in no way affects the purpose for which land or jurisdiction was ceded. See, also, *Western Union Tel. Co.* v. *Brown,* 234 U. S. 542; *Kaufman* v. *Hopper,* 151 App. Div. (N. Y.) 28.

"The plaintiff further contends that the United States is not in possession of the premises but that defendant is in possession under authority from the Federal government and consequently State laws apply, citing *Barrett* v. *Palmer,* 135 N. Y. 336. That was a case where jurisdiction had been ceded by the State

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of New York over lands belonging to the United States and used and occupied as a navy yard. The grant contained the provision that:

"'The United States may retain such use and jurisdiction as long as the premises described shall be used for the purposes for which jurisdiction is ceded and no longer.'

"Thereafter, the Federal government leased a portion of the property to the city of Brooklyn for market purposes. The action was brought to recover damages for an unlawful ouster from the possession of two stands in such market. The New York court held that the State courts had jurisdiction because as nothing had

"'been done by congress to displace the laws of this State and the jurisdiction of its courts in regard to private rights and remedies with respect to the lands ceded for the purpose of a navy yard, in Brooklyn, these matters remain unaffected by the act of cession.'

"The Supreme Court of the United States in *Palmer* v. *Barrett,* 162 U. S. 399, affirmed the decision but did not adopt the reasoning. It held that the lease to the city was a violation of the condition of cession and so long as it remained in force, the exclusive authority of the United States was suspended. The court expressly refrained from deciding what would have been the effect of the lease had the reservation clause above quoted not been in the act of cession.

"In the case at bar there is no such reservation nor lease of possession. The defendant, if it may be said to be in possession of the fourth lock, is in possession only as a contractor for the United States, engaged in constructing work directly pertinent to the purpose of the cession, and it is always subject to the inspection, supervision and control of government engineers. There is no exclusive possession given it for its own benefit, nor has the government abrogated any of its rights of control. Moreover, the mere fact that the lock is not completed or that it may not be in actual use as an operating lock nor that the whole canal may not be directly used in the work of navigation would not oust the jurisdiction of the United States. *Benson* v. *United States,* 146 U. S. 325.

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"Act No. 17 of the Public Acts of 1881, therefore, especially when read in connection with Act No. 39 of the Laws of 1873, operated to cede to the United States exclusive jurisdiction over the land conveyed to them by such act. It is fundamental that the cession of territory by one sovereignty to another extinguishes the jurisdiction of the former except as to reservations. The reservation of the right to execute civil and criminal process in the ceded lands merely emphasizes the character of the cession and reserves no other right to the State of Michigan. *In re Ladd,* 74 Fed. 31; *State* v. *Mack,* 23 Nev. 365, and other cases above cited. In consequence of such jurisdiction vesting in the Federal government, the laws of the State of Michigan, enacted after the cession, are not applicable to the case at bar.

"The defendant was, therefore, entitled to maintain the common-law defenses and inasmuch as those defenses would preclude recovery, under the facts, the defendant is entitled to have judgment, notwithstanding the verdict."

A judgment was entered accordingly which is reviewed here by writ of error.

The questions involved from the viewpoint of the appellant are:

1. Does the workmen's compensation act of Michigan govern the relations of employer and employee respecting injury, or death, to an employee sustained in the course of employment on work being done for the Federal government under contract, and on land ceded by the State to the United States for commerce purposes, but which land is within the State of Michigan?
2. Regardless of the application of the workmen's compensation act, should the verdict of the jury in plaintiff's favor stand?

Taking up the last of the questions first:

The record disclosed that Mr. Willis had worked as a carpenter for several years. He had worked on the contract which defendant had with the government from July until in October. He had charge of a crew

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of men in putting up and taking down forms like the one upon which he was at work when killed, in which concrete was poured. There is some conflict as to whether the form was being taken down or was being built higher when the accident occurred, but there is no conflict upon the question of whether the deceased saw or could have seen in the exercise of ordinary care just what the situation was. If the litigation is controlled by the common law it was the duty of the trial judge, upon the record made, to direct a verdict for the defendant under many cases decided by this court, some of which are *Beesley* v. *F. W. Wheeler & Co.*, 103 Mich. 196; *Pilucki* v. *Spring Works*, 117 Mich. 111; *Nephew* v. *Whitehead*, 123 Mich. 255; *Livingstone* v. *Plate Glass Co.*, 146 Mich. 236; *Strepanski* v. *Plaster Co.*, 162 Mich. 696; *Scendar* v. *Copper Co.*, 169 Mich. 665; *Fryezynski* v. *Leather Co.*, 171 Mich. 113; *Poirier* v. *Lumber Co.*, 182 Mich. 678.

Returning to the first question presented by appellant, namely, that of jurisdiction. Before entering upon its discussion we think it well to say that even conceding that the employer's liability law is operative over the place of the accident, we think it doubtful if the record discloses a case of actionable negligence on the part of the employer.

In support of the claim that the workmen's compensation act of Michigan applies to the facts in this case, appellant calls attention to section 1, article 1, of the Constitution of Michigan, which reads:

"The State of Michigan consists of and has jurisdiction over the territory embraced within the following boundaries" (and then the boundaries are described).

The contention is made that because of this and the proviso contained in the act of 1881 the State retains the right to legislate about matters relating to internal, municipal, and local affairs, and particularly

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over the rights and remedies of persons in their private transactions, such as between employer and employee. We quote from the brief:

"We submit it most certainly does include such legislative jurisdiction. If this is so, could the legislature cede, grant or relinquish this jurisdiction, even though we agree (and we do not) to the interpretation placed upon the act of cession by the trial court?

"It is fundamental that the legislature of the State may not enact any legislation that contravenes an express or necessarily implied provision of the Constitution. The people of the State of Michigan through their Constitution have said that their State "has jurisdiction over the territory" involved in this case. This, we have said, necessarily includes legislative jurisdiction over the matters stated and like matters, and such as the one involved here. Could the legislature, therefore, by any enactment limit, restrict, cede, or grant away this legislative jurisdiction?

"Moreover every person, firm, private and public corporation employing labor is subject to the provisions of Act No. 10, Public Acts of 1912 (Special Session), known as the workmen's compensation law. If they elect to come under the act, they must pay compensation for injuries or death of employees sustained in the course of employment. If they do not elect to come under its provisions they are barred from interposing the defenses commonly called the common-law defenses. The defendant is a private corporation operating within the State of Michigan, and nowhere by the provisions of the act is it * * * excluded from its provisions."

Counsel lay great stress upon the following cases which they claim support their contention: *Barrett* v. *Palmer*, 135 N. Y. 336; *In re O'Connor*, 37 Wis. 379; *Fort Leavenworth R. Co.* v. *Loewe*, 114 U. S. 525, and *Chicago, etc., R. Co.* v. *McGlinn*, 114 U. S. 542. Other authorities are also cited which may be found by referring to the brief of counsel. A reference to the cases cited show each of them to be distinguishable from the instant case.

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We quote from *Fort Leavenworth R. Co.* v. *Loewe, supra:*

"These authorities are sufficient to support the proposition which follows naturally from the language of the Constitution, that no other legislative power than that of congress can be exercised over lands within a State purchased by the United States with her consent for one of the purposes designated; and that such consent under the Constitution operates to exclude all other legislative authority.

"But * * * where, therefore, lands are acquired in any other way by the United States within the limits of a State than by purchase with her consent, they will hold the lands subject to this qualification: that if upon them forts, arsenals, or other public buildings are erected for the uses of the general government, such buildings with their appurtenances as instrumentalities for the execution of its powers will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the general government. Their exemption from State control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers. But when not used as such instrumentalities, the legislative power of the State over the places acquired will be as full and complete as over any other places within her limits."

In each of the cases cited it will be found either that there was an express reservation of jurisdiction, as in the case from which we are quoting, or as in the case of *Barrett* v. *Palmer, supra,* the land was not used for the purpose for which it was ceded.

After all is said, the instant case must be decided upon the construction put upon the following, contained in the act of 1881:

"*Provided,* that this cession is upon the express condition that the State of Michigan shall so far retain concurrent jurisdiction with the United States over the Saint Mary's Falls ship canal, and in and over all

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lands acquired or hereafter acquired, for its use; that any civil or criminal process issued by any court of competent jurisdiction, or officers having authority of law to issue such process, and all orders made by such court, or any judicial officer duly empowered to make such orders, and necessary to be served upon any such person, may be executed upon said Saint Mary's Falls ship canal, its lands, and in the buildings that may be erected thereon, in the same way and manner as if jurisdiction had not been ceded as aforesaid."

Does this mean, as contended by appellant, that, in the absence of legislation by congress, the legislature of Michigan may legislate upon the subject of employers and employed and have the legislation as effective over the ceded lands as though there had been no cession of the lands? If, though the lands were ceded in 1881, the legislature may make effective in 1912 an employers' liability law, where is the limitation upon legislative authority? May it fix the hours of labor and thus indirectly affect the contracts which the Federal government may be able to make in relation to the construction of locks and other governmental work? Such a construction of the proviso would be exceedingly embarrassing to the general government and we think is untenable. See *United States* v. *Cornell*, 2 Mason, 60; *United States* v. *Tucker*, 122 Fed., at p. 521, and the many cases cited there; *Benson* v. *United States*, 146 U. S. 325. Other authorities are found in the brief of the appellee.

The jurisdiction reserved was for the purpose of providing there should be no neutral territory where civil and criminal process might not be served.

Judgment is affirmed, with costs to the defendant.

BIRD, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred with MOORE, J.

OSTRANDER, C. J. It is said in the opinion of Justice MOORE:

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"Returning to the first question presented by appellant, namely, that of jurisdiction. Before entering upon its discussion, we think it well to say that, even conceding that the employers' liability law is operative over the place of the accident, we think it doubtful if the record discloses a case of actionable negligence on the part of the employer."

I am in doubt as to the meaning, and, given any meaning, the significance of the last-quoted sentence, and express no opinion upon the point stated. I concur in affirming the judgment.

MT. CLEMENS SUGAR CO. *v.* GRAND TRUNK RAILWAY CO.

1. RAILROADS—DEMURRAGE—QUESTION FOR JURY — DIRECTED VERDICT.

In an action against a railroad company for the recovery of demurrage charges paid under protest by plaintiff, the owner of a beet sugar factory, under threat of withdrawal of defendant's switch engine and crew in case of refusal, where the evidence was conflicting as to whether delay in unloading cars during the free time allowed by the law was occasioned by plaintiff or defendant, the issue was properly submitted to the jury, and the court below was not in error in refusing to direct a verdict for defendant.

2. SAME—APPEAL AND ERROR—TRIAL—INSTRUCTIONS.

Refusal of the trial court to instruct the jury that the switching service on plaintiff's spur track was "plant switching," for which defendant was not liable, was not prejudicial to defendant, where the court in his instructions withdrew from their consideration the question of damages arising from defendant's failure to switch the cars after they were placed on plaintiff's spur; such instruction being in accordance with defendant's contention, it was immaterial whether denominated "plant switching" or "terminal switching."

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3. SAME.

Nor could defendant complain of the court's instruction that defendant had the right to assess demurrage upon cars consigned to plaintiff which were held at nearby stations, upon its road, because of plaintiff's inability to handle them; said instruction being in accordance with defendant's contention.

4. NEW TRIAL—ISSUES—OVERWHELMING WEIGHT OF EVIDENCE.

Where the issues of fact were submitted to the jury under proper instructions, defendant's motion for a new trial on the ground that the verdict for plaintiff was against the overwhelming weight of the evidence was properly refused.

Error to Wayne; Van Zile, J. Submitted June 12, 1917. (Docket No. 37.) Decided March 1, 1918. Rehearing denied June 20, 1918.

Assumpsit by the Mt. Clemens Sugar Company against the Grand Trunk Railway Company for demurrage charges paid under protest. Judgment for plaintiff. Defendant brings error. Affirmed.

L. C. Stanley (*Geer, Williams & Martin*, of counsel), for appellant.

Thomas A. E. Weadock (*John C. Weadock*, of counsel), for appellee.

BIRD, J. Plaintiff owns and operates a sugar factory near Mt. Clemens which is connected with defendant's railroad system by means of a spur track about two miles north of Mt. Clemens. During the sugar making seasons of 1906-7, 1908-9, 1909-10, 1911-12, plaintiff, under threat of being deprived of the switch engine and crew, paid certain demurrage charges under protest to defendant, amounting to nearly $20,000. It was claimed that these charges should not have been demanded because plaintiff was not responsible for the delay in unloading the cars during the free time allowed by law, but that the fault lay with defendant because of its failure to

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"spot" the loaded cars at the plant and withdraw the empty ones. It was also claimed that defendant's failure in this respect was due to its inadequate yard and track facilities at Mt. Clemens, together with its lack of suitable locomotive power and insufficient rolling stock. Defendant denied these contentions and asserted that plaintiff's failure to release the cars was due to the fact that it ordered more cars shipped at one time than its capacity could take care of, and as a result there were loaded cars awaiting delivery at Mt. Clemens, Milwaukee Junction, Durand, and other nearby stations. Upon this issue of fact much testimony was taken tending to establish the conflicting claims. The question was submitted to the jury and they found the fault lay with defendant, and assessed plaintiff's damages at the sum of $18,334.02. Defendant has removed the proceedings to this court for review, claiming that the trial court was in error because of its refusal to direct a verdict in its behalf.

1. Plaintiff, to establish its contention, showed that its daily capacity was from 35 to 40 cars of beets; that its tracks would hold 159 cars, and that if defendant had had sufficient trackage to have stored the consigned cars and taken care of the empties, there would have been little or no delay in unloading them; that defendant's track facilities at Mt. Clemens consisted of a single main track, a passing track three-quarters of a mile in length, a team track which would hold not to exceed 40 cars, and a private siding which it used holding 18 cars; that its track and yard facilities in these years were no greater than they were 30 years ago when Mt. Clemens was much smaller and the traffic much less than at the present time. It was further shown that the spur track to plaintiff's factory connected directly with the main line track instead of with the siding, and this was the cause of much delay on the part of the switching crew, as they

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were obliged to wait, in the clear, the passing of 16 regular, besides several extra, trains each day. It further appeared that the lack of trackage compelled defendant to store loaded cars at Milwaukee Junction, Durand, and other nearby stations, and as a result the beets could not be delivered to the factory fast enough to keep the plant supplied. There was much more testimony along this same line which tended to show that defendant was in fault for failure to deliver the cars at the plant when needed.

On the other hand, testimony was offered tending to discredit some of plaintiff's testimony in this regard, and other testimony tending to show that the cars were delivered as rapidly as plaintiff could take care of them. The testimony presented a clean-cut question of fact, and was such that the jury might have determined it either way. Counsel's contention that a verdict should have been directed for defendant on this issue, in the face of this testimony, is not easily understood. We shall simply have to dispose of it by saying we disagree with them.

2. Counsel argue that the trial court was in error in refusing to instruct the jury that the switching service on the spur which plaintiff counts upon as not having been performed or properly performed was "plant switching" for which defendant was not liable. The interstate commerce commission has drawn a distinction between "plant switching" and "terminal switching," holding that the former is outside of the contract of the carrier, and, therefore, unlawful as a rebate, while the latter is within its contract of carriage (14 I. C. C. 237-246). This distinction has been discussed by the Federal courts. See *Los Angeles Switching Case*, 234 U. S. 294. Much controversy was indulged in at the trial as to whether the switching service on the spur at the plant, which was contracted for and rendered by defendant, was "plant

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switching" or "terminal switching." The declaration filed in this case covered a wide range of recovery. It was framed to recover for the demurrage paid under protest; for diverting cars of beets to other sugar factories; for the value of beets frozen and rotted by reason of delayed deliveries; for the wages of servants who were idle because of failure to deliver cars promptly, and for the failure of defendant to promptly switch the cars at the plant. At the close of the testimony the trial court was of the opinion, for various reasons which need not be herein recited, that but one question should be submitted to the jury, and that was the question of damages occasioned by a failure to deliver cars to the spur or exchange track, and the jury were expressly instructed that no damages arising by a failure to switch the cars after they were placed on the spur should be allowed, as will be shown by the following excerpt:

"I think, gentlemen of the jury, that there is no question but that in this case this railroad company was not obliged to do this switching in the yard of the complainant of these cars, and that whatever was done was volunteered, and that the complainant cannot find fault with reference to that or require it; and that the failure of the company, if there was any failure, and I may not say that there was, if there was any failure that that cannot be considered in this case by you, this failure to do this switching. So no claim of delay can be made on this ground."

We refrain from any comment as to the correctness of this instruction, but refer to it solely for the purpose of showing that the trial court instructed the jury in accordance with defendant's contention. In view of this elimination by the court we can see no occasion for discussing the question as to whether switching service on the spur and at the plant should be denominated "plant switching" or "terminal switching."

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3. A considerable portion of the demurrage charge accrued on cars held at Milwaukee Junction, Durand, and other nearby stations. Plaintiff contended that demurrage could not be properly charged until the cars arrived at Mt. Clemens. Defendant insisted this was a proper charge if the cars were held at these stations because plaintiff could not handle them. The trial court took defendant's view and charged the jury in part that:

"The defendant company had the right to assess demurrage upon cars consigned to plaintiff which were held at Milwaukee Junction, Durand, or any station upon its road, because of the plaintiff's inability to receive and dispose of them at the factory, and was not called upon to wait until it had brought said cars to Mt. Clemens before charging demurrage upon the same."

As the trial court agreed with counsel in this contention, it will receive no further consideration.

4. It was urged upon a motion for a new trial that the verdict was against the overwhelming weight of the testimony. The issue of fact was submitted to the jury as favorably to defendant's case as the proofs would permit, and we think the conclusion reached by them is amply justified by the record. The record is quite persuasive that the real difficulty lay in the lack of terminal facilities of defendant at Mt. Clemens, and in the fact that the switching crew had to use the main track for switching purposes which would have been unnecessary had plaintiff's spur been connected with the siding. Had it been so connected switching operations could have gone forward while main line trains were passing. The application for a new trial upon this ground was properly overruled.

The judgment must be affirmed.

OSTRANDER, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

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PEOPLE, *ex rel.* BROWN, *v.* PARSONS.

1. MUNICIPAL CORPORATIONS—CHARTER—CONSTRUCTION—ABSURDITY.
A section of a city charter will not be given a literal construction, where such construction would lead to a manifest absurdity.

2. ELECTIONS—LANSING CHARTER—CONSTRUCTION—INTENT — MEMBERS OF CITY COUNCIL—ELIGIBILITY AS CANDIDATES.
Section 53 of the charter of the city of Lansing, providing that "No member of the city council shall, during the period for which he was elected, be elected or appointed to, or be competent to hold, any office or position or receive any employment directly or indirectly connected with the city government," construed, and *held*, to be the intent to prevent the holding of two offices by one man at the same time, and the holding by one man of a second office during the period of the term of his first office, and not to disqualify aldermen from succeeding themselves or from being elected to the office of mayor or city treasurer for the term succeeding their terms as aldermen.

Certiorari to Ingham; Collingwood, J. Submitted March 13, 1918. (Calendar No. 28,333.) Decided March 13, 1918.

Mandamus by the people of the State of Michigan, on the relation of William C. Brown, prosecuting attorney of Ingham county, to compel Judson A. Parsons, clerk of the city of Lansing, to remove certain petitions from his files and to refrain from placing certain names upon the official ballot for city offices. Judgment for relator. Respondent brings certiorari. Reversed.

Cummins & Nichols, Edward Cahill, and *Walter S. Foster,* for relator.

Joseph H. Dunnebacke, City Attorney, *Jason E.*

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Nichols, Frank L. Dodge, and *Warner & Raudabaugh,* for respondent.

PER CURIAM. Certiorari to mandamus. The learned circuit judge held that under the provisions of section 53 of the charter of the city of Lansing certain aldermen were disqualified to succeed themselves in office by election, and that certain other members of the council were disqualified to be elected to the office of mayor and of city treasurer. The charter provision is as follows:

"No member of the city council shall, during the period for which he was elected, be elected or appointed to, or be competent to hold any office or position or receive any employment directly or indirectly connected with the city government." * * *

Given a literal construction this section of the charter leads to the manifest absurdity that the moment a citizen was elected a member of the city council, he would thereupon become disqualified to hold the very office to which he had been elected. It is obvious that the legislative body (in this case the people) had no such intention, but that their purpose was to provide against the same evils which brought about the adoption of section 7 of article 5 of the Constitution of the State. This section has been repeatedly construed by this court, notably in the case of *Fyfe* v. *Kent County Clerk,* 149 Mich. 349, and in *Murtha* v. *Lindsay,* 187 Mich. 79.

We are of opinion that the evils sought to be remedied by the enactment of the legislation in question were the holding of two offices by one man at the same time, and the holding by one man of a second office during the period of the term of his first office. Given this construction, the provision in question affords the protection sought.

The order of the lower court is reversed.

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HENDRICKSON v. HARRY.

ON REHEARING.

1. WITNESSES—COMPETENCY—HUSBAND AND WIFE—DIVORCED WIFE—ALIENATION OF AFFECTIONS.
   In an action by a husband for the alienation of his wife's affections, the divorced wife was a competent witness as to acts of physical violence by plaintiff toward her, and her feeling toward, and affection for, him; the action not being instituted in consequence of adultery. 3 Comp. Laws 1915, §§ 12551, 12555.

2. SAME—APPEAL AND ERROR—EVIDENCE.
   In such action, where the trial court, following a colloquy between court and counsel, stated he understood the divorced wife was offered as a witness for the purpose of showing acts of physical violence, and plaintiff's counsel made no suggestion that the court misunderstood the offer, the Supreme Court, on appeal, will regard the incident as an offer made and denied to prove assault upon the wife by plaintiff.

3. SAME—HUSBAND AND WIFE—EVIDENCE—ADMISSIBILITY.
   The divorced wife, being a competent witness, generally, is subject to cross-examination like any other witness, except that she may not testify as to communications between herself and husband during coverture.

4. HUSBAND AND WIFE—ALIENATION OF AFFECTIONS—DAMAGES.
   The mere fact that a husband and wife are not, for a period, on friendly terms, is no excuse for an outsider to interfere in their domestic relations, although the real injury he may do may be less than where happy family relations are destroyed.

Error to Houghton; O'Brien, J. Submitted April 10, 1917. (Docket No. 131.) Decided September 27, 1917. Resubmitted March 5, 1918. Former opinion reversed March 27, 1918.

Case by William Hendrickson against Absalom Harry for the alienation of his wife's affections. Judgment for plaintiff. Defendant brings error. Reversed.

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Galbraith & McCormack (*J. F. Hambitzer*, of counsel), for appellant.

Burritt & Burritt, for appellee.

OSTRANDER, J. In December, 1915, plaintiff's wife filed her bill for a divorce in the circuit court for the county of Houghton, in chancery, and in June, 1916, a decree of divorce was entered in said cause, which recites that it satisfactorily appeared that the material facts charged in the bill were true. Among the facts charged in the bill are the following: Shortly after marriage, the husband began to drink liquors to excess, and in October, 1910, while the parties were living in Superior, Wis., and from then to July, 1911, he on divers days and times beat, struck, kicked, and choked his wife and neglected to furnish her necessary food and clothing. About November 1, 1910, he came home drunk and assaulted his wife; a police officer interfering in his pastime of beating her. On Christmas Eve, 1910, he came home drunk, and assaulted and beat his wife, knocked her down, kicked her, and threatened to kill her. In the spring of 1911, while she was ill and confined to her bed and under care of a physician, he refused to supply fuel for heat, or any provision or sustenance, and she was dependent upon charitable neighbors for food and necessary attention. He gave her a beating July 4, 1911. He was much of the time a loafer, requiring his wife to work as waitress in hotels and restaurants; he using the money she earned for drink. He habitually used in her presence obscene and profane language, and called her vile names. She left him July 5, 1911, going to the home of her parents, where she thereafter resided, and where she was when she filed her bill for divorce. In her bill she describes herself as Senja Hendrickson. She states therein that there has been

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no issue as the result of the marriage, and she gives the date of marriage as October 14, 1909.

Plaintiff filed his declaration in the cause at bar November 6, 1914, alleging marriage to Hilma Hendrickson, "his present wife," February 28, 1908; alleging further that he always enjoyed her respect, love, affection, and society until defendant's wrongdoing, which began about August 1, 1913, and consisted of attention, protestation of respect and affection for his wife, and other arts and wiles, had the effect of destroying and alienating the affection which his wife had for him, depriving him of her society, comfort, and aid. The record advises us that upon a trial of the issue joined in this cause a verdict for $1,500 for plaintiff was returned, and that a judgment was entered on the verdict. The errors assigned by defendant are:

"(1) The court erred in permitting the plaintiff to testify, under objection, that he had heard from other people that they had seen Hilma Hendrickson with Harry; it being an indirect way of corroborating plaintiff without legal proof.

"(2) The court erred in that, after Ellen Juntinen testified she had never been in the house of ill fame in Hancock and never had pleaded guilty to being a prostitute, the attorney for the defendant, upon cross-examination of said Ellen Juntinen (formerly Ellen Lake), propounded the following question: 'Did Gust Wickstrom ever take you out of Madge Beital's house in South Range?' To which the attorney for the plaintiff objected, and his objection having been sustained by the court as being incompetent and improper.

"(3) The court erred in not permitting the defendant to show physical acts of violence committed by the plaintiff, against his wife, Hilma Hendrickson, before the commencement of this suit.

"(4) The court erred in holding that the testimony of Hilma Hendrickson showing her state of mind and affection at the time of the beginning of the acts complained of August 1, 1913."

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The fourth assignment is without meaning unless words are supplied; the third and first lack precision, although they may be aided by reference to the exception upon which they are based. No comment is made by counsel upon the difference in the dates set up in the bill for divorce, which was received in evidence, from the dates testified to upon the trial, although it is apparent that, if the dates in the bill are correctly given, the wife had separated from her husband some two years before defendant's alleged misconduct began.

1. Plaintiff was testifying, had been cross-examined, and had admitted that he had called his wife a whore. On redirect examination, he said he called her that because "I see her with Harry." He was asked if he had heard from other people that they had seen her with Harry, and answered, "Yes." Objection was made (the question having been answered) that the testimony was incompetent. His counsel suggested that, as affecting plaintiff's conduct, what he had heard was competent, the court said, "Restrict it to that purpose," no other ruling was made, and defendant excepted. As counsel for both sides left the matter at this point, it may be assumed, I think, that the ruling made amounted to this: The testimony was not competent to prove that any one else had seen plaintiff's wife and Harry together; but, plaintiff having been told that others had seen them together, the fact explained plaintiff's conduct towards his wife. If we assume, also, that the jury understood the matter in this way, the ruling, though of doubtful propriety, cannot be treated as reversible error. In the connection in which it was given, the testimony really amounts to nothing.

2. Plaintiff produced as a witness Mrs. Ellen Juntinen, who gave testimony tending to prove that defendant sought to rent of her rooms to be occupied

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by himself and plaintiff's wife two or three nights a week. On cross-examination the witness had said she had been arrested once, with Hendrickson, the case being dismissed, they having been brought to jail Saturday night, where they remained until Monday morning; that she had never pleaded guilty to being a prostitute, but between her first and second marriage she had had a child. She admitted knowing Gust Wickstrom, a night watchman in Hancock. She was asked:

"*Q.* Did Gust Wickstrom ever take you out in Madge Bietila's house in South Range?"

To this the court sustained an objection, and defendant excepted. In argument it is said:

"The testimony has her in company of Hendrickson on different occasions. There is testimony to the effect that she bore a bad reputation, and she gave some damaging testimony to assist Hendrickson, and therefore we contend that it was competent to show, if we could, that she was taken from a house of ill fame and was a prostitute therein, as bearing upon her credibility and also as bearing upon the relations between her and Hendrickson."

That the purpose of the question was the one stated in argument is not made clear by the question. If the declared purpose had been served by an answer, it is not clear that Hendrickson's relations with this woman affected at all the conduct of Hendrickson's wife. How far cross-examination of this nature shall proceed is to be determined by the trial judge in the exercise of judicial discretion, and it is not made to appear that discretion was in this instance abused. The rule was recently restated in *People* v. *Cutler*, 197 Mich. 6.

3. The third assignment of error is made somewhat certain and specific by the exception, from which and the record context it appears that the offer made was

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to prove, by the wife, herself, acts of physical violence of the plaintiff, and her state of mind and affection for the plaintiff at the time of the beginning of the alleged wrongs complained about by plaintiff. The testimony was excluded. In this connection attention is called to the language of the offer, or of one offer, to prove which contains the recital that she was shown by the record to be "the divorced wife of the plaintiff." The record shows that the trial began on April 27, 1916, that judgment was rendered April 28, 1916, and that the decree of divorce was made June 8, 1916. The statement of facts made by counsel for appellant gives the date of the divorce as June 8, 1916. It would appear, therefore, that when offered as a witness she was the wife of the plaintiff. Yet counsel for appellant discusses at some length the subject of the effect of divorce upon the competency of husband or wife to testify in relation to confidential communications. The court ought not to be required to discover at its peril, or the peril of litigants, the points presented for decision. I think we must treat the subject as though she was both wife and witness, and, as counsel have done so, we must proceed as though no charge of adultery or criminal conversation was directly or indirectly involved. The statute (3 Comp. Laws, § 10213, 3 Comp. Laws 1915, § 12555) is:

"A husband shall not be examined as a witness for or against his wife without her consent; nor a wife for or against her husband without his consent, * * * nor shall either, during the marriage or afterwards, without the consent of both, be examined as to any communication made by one to the other during the marriage."

The wife is not a party to this suit; the husband is a party. The offer was to examine her as a witness against him, without his consent. The statute forbids it. Had the marital relation ended when the testi-

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mony was proposed, a different question would have been presented. See (the point, however, not appearing to have been raised) *Derham* v. *Derham,* 125 Mich. 109 (83 N. W. 1005). In *People* v. *Marble,* 38 Mich. 117, the marriage relation had ended when the husband gave his testimony. See, generally, *Perry* v. *Lovejoy,* 49 Mich. 529 (14 N. W. 485).

4. What has been said disposes, also, of this point.

The judgment is affirmed, with costs to appellee.

KUHN, C. J., and STONE, BIRD, MOORE, STEERE, BROOKE, and FELLOWS, JJ., concurred.

ON REHEARING.

OSTRANDER, C. J. This cause was submitted at the April term, 1917. An opinion went down September 27, 1917, which may be found reported *ante,* 42. The judgment was affirmed. The action is for damages for alienating the affections of plaintiff's wife; the recovery was substantial. At the trial the defendant called as a witness Hilma Hendrickson, who was sworn and gave her name. The record shows the following matter:

"*Mr. Burritt:* Now, I desire at this time, if your honor pleases, to make an objection to this witness testifying to any fact or alleged fact, circumstances as it occurred or took place between her and her husband and this defendant during the time they were living together as husband and wife. I call the court's attention to that so that if there should be any inquiry made—

"*The Court:* I think I'll excuse the jury.

"(Jury retired from the court room).

"(Argument on objection by Mr. Galbraith).

"*Mr. Burritt:* The plaintiff objects to the witness, who was the wife of the plaintiff down to the date it appears by the records that the decree of divorce was granted, and objects to her testifying as to any communication made by her to her husband at that time or by her husband to her and base the objection on next to the last subdivision of the statute.

"*The Court:* I will sustain that objection as to the

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communications but Mr. Galbraith admits that they are not admissible, but he is going to offer, as I understand it, to show acts of physical violence committed by the husband against the wife before you began your action. What have you to say about that?

"*Mr. Burritt:* I object to it, and I don't see how you can show acts of physical violence. If she is a witness and narrated physical acts she would be prohibited from cross-examination.

"*The Court:* I think I will sustain that.

"*Mr. Galbraith:* I'll make a further offer to show by the witness, Hilma Hendrickson, who is shown by the record to be the divorced wife of the plaintiff, William Hendrickson, her state of mind and affection at the time, planted as the time of the beginning of the wrong complained of, namely, the 1st of August, 1913.

"*Mr. Burritt:* We object to that as incompetent.

"*The Court:* I think I'll sustain that objection. It seems to me that if she testified to her state of mind it would be impossible to make such a cross-examination in fairness to this plaintiff without going into their marriage relations. I think it falls under the same objections, and I will sustain it. I think you have a point there that is certainly worthy of consideration."

It is assigned as error:

"(1) The court erred in permitting the plaintiff to testify, under objection, that he had heard from other people that they had seen Hilma Hendrickson with Harry, it being an indirect way of corroborating plaintiff without legal proof.

"(2) The court erred in that after Ellen Juntinen testified she had never been in the house of ill-fame in Hancock and never had pleaded guilty to being a prostitute, the attorney for the defendant, upon cross-examination of said Ellen Juntinen (formerly Ellen Lake) propounded the following question: Did Gust Wickstrom ever take you out of Madge Beital's house in South Range? To which the attorney for the plaintiff objected, and his objection having been sustained by the court as being incompetent and improper.

"(3) The court erred in not permitting the defend-

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ant to show physical acts of violence committed by the plaintiff against his wife, Hilma Hendrickson, before the commencement of this suit.

"(4) The court erred in holding that the testimony of Hilma Hendrickson showing her state of mind and affection at the time of the beginning of the acts complained of August 1st, 1913."

In the former opinion these alleged errors were considered, but upon the record then presented were considered as though the record showed the witness to be the wife of plaintiff at the time she was offered as a witness. Later this court was moved to remand the record and grant a rehearing, the ground being that by inadvertence the record in another divorce suit, begun by another woman named Hendrickson, had been returned with the writ of error instead of the record actually put in evidence. The motion to remand was granted and the record has been amended. The motion for rehearing was granted. The cause is now before us upon the corrected record, which shows that a decree of divorce was signed and filed June 7, 1915, while the trial of the instant cause was begun April 27, 1916.

Upon this record the only question to be determined is whether the testimony of the divorced wife is competent to prove any of the things embraced in the offer made by counsel. In this connection, counsel for appellee say that there was no offer made to prove that plaintiff assaulted his wife or otherwise offered her physical violence, that the suggestion in this behalf came from the court in the colloquy above set out. But it will be noticed that argument preceded the statement made by the court, the details of which argument are not set out, and that at the time it was not suggested by counsel for appellee that the court misunderstood the offer or that no such offer had been made. On the contrary, counsel for appellee made

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objection as to a specific offer to the competency of the witness and his objection was sustained by the court. Under the circumstances this court will regard the offer as made and denied.

The applicable statutes in force when the cause was tried, 3 Comp. Laws 1915, §§ 12551, 12555, read as follows:

"(12551) SEC. 63. No person shall be excluded from giving evidence in any matter, civil or criminal, by reason of crime or for any interest of such person in the matter, suit, or proceeding in question, or in the event of such matter, suit or proceeding, in which such testimony may be offered, or by reason of marital or other relationship to any party thereto; but such interest, relationship, or conviction of crime, may be shown for the purpose of drawing in question the credibility of such witness, except as is hereinafter provided."

"(12555) SEC. 67. A husband shall not be examined as a witness for or against his wife without her consent; nor a wife for or against her husband without his consent, except in suits for divorce and in cases of prosecution for bigamy, and where the cause of action grows out of a personal wrong or injury done by one to the other, or grows out of the refusal or neglect to furnish the wife or children with suitable support, and except in cases of desertion or abandonment, and cases arising under act one hundred thirty-six of the Public Acts of nineteen hundred five, relating to marriage, and cases where the husband or wife shall be a party to the record in a suit, action, or proceeding, where the title to the separate property of the husband or wife so called or offered as a witness, or where the title to property derived from, through or under the husband or wife so called or offered as a witness, shall be the subject matter in controversy or litigation in such suit, action or proceeding, in opposition to the claim or interest of the other of said married persons, who is a party to the record in such suit, action or proceeding; and in all such cases, such husband or wife who makes such claim of title, or under or from whom such title is derived, shall be as competent to testify in relation

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to said separate property and the title thereto without the consent of said husband or wife, who is a party to the record in such suit, action or proceeding, as though such marriage relation did not exist; nor shall either, during the marriage or afterwards, without the consent of both, be examined as to any communication made by one to the other during the marriage, but in any action or proceeding instituted by the husband or wife, in consequence of adultery, the husband and wife shall not be competent to testify."

According to the letter of the law the witness Hilma Hendrickson was a competent witness for the defendant except that she could not testify to communications made by herself to her husband and by him to her during their marriage, this action being treated by counsel for both parties as not being one instituted in consequence of adultery. It is said for plaintiff, appellee, that if she is permitted to answer as to her feeling towards and affection for him, the real reason for her state of mind at the time must be developed by cross-examination, which it is obvious cannot be conducted without inquiry into the domestic relations; that

"Had she been permitted to testify that at said time she had lost her affection for her husband, the question would at once arise as to why she had lost her affection for him. Had she been permitted to testify that she lost her affection for her husband on account of his acts of physical violence against her, the cause of such acts of physical violence would necessarily have to be inquired into. In any event, it would be impossible to cross-examine the witness so as to show the real reason for her loss of affection for the plaintiff, without going into their marriage relation."

It must be held that the divorced wife was a competent witness, generally, for the defendant—and for that matter for the plaintiff—and it appearing that no objection was made that the offer to prove was too broad, no suggestion made that it should be more

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specific, it is held that the court should have permitted the examination to proceed until testimony was called for which she was not competent to give. What questions may be asked her cannot be anticipated, nor can this court upon this record lay down any rules for the trial court beyond the one above stated. The witness will be subject to cross-examination like any other witness, and her credibility and the weight of her testimony will be for the jury.

It is to be remembered, too, that the mere fact that a husband and wife are not for a period on friendly terms does not furnish an excuse for the interference into the domestic relation of an outsider, although the real injury he may do may be less than when a tranquil, happy family life is destroyed.

The judgment is reversed, with costs to appellant.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

HILDEBRANDT *v.* DETROIT UNITED RAILWAY.

1. STREET RAILWAYS—PERSONAL INJURIES—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE—DIRECTED VERDICT.

In an action for personal injuries received by the driver of a delivery wagon while attempting to cross defendant's street car tracks, where, instead of continuing across the tracks when his horse regained his feet, after a stumble, he turned and drove along the track for a distance of 45 feet before being struck by the car, when one-third of the distance traveled would have taken him safely across, his conduct was so contrary to what the average man of ordinary prudence would do under similar circumstances

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as to constitute contributory negligence as a matter of law.

2. SAME—DISCOVERED DANGER—LAST CLEAR CHANCE—EVIDENCE—GROSS NEGLIGENCE.

In the absence of any evidence showing how fast the car was running, or that it could have been stopped after its motorman discovered plaintiff's danger, the claim of subsequent negligence is not sustained. OSTRANDER, C. J., and STONE, KUHN, and MOORE, JJ., dissenting.

Error to Wayne; Brown, J., presiding. Submitted June 19, 1917. (Docket No. 83.) Decided March 27, 1918.

Case by Joseph Hildebrandt against the Detroit United Railway for personal injuries. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed by a divided court.

John H. Dohrman and *Eugene L. Mistersky*, for appellant.

Corliss, Leete & Moody and *Benjamin S. Pagel*, for appellee.

BIRD, J. Plaintiff was engaged in delivering bread to the retailers in the city of Detroit with a horse and delivery wagon. On December 22, 1914, he had made his early morning deliveries and was on his way home, traveling east on Theodore street. It was snowing and there were several inches of snow on the ground which made it more or less slippery. As he approached Grandy street, which crosses Theodore, his view to the south was cut off by a cigar factory situate on the southwest corner of Theodore and Grandy streets. Knowing that defendant's cars ran north on Grandy street, he got out upon the running board to make observations toward the south. When he got far enough east to observe the track, he saw a car ap-

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proaching something more than a block away. He proceeded to the track and started across, but just as his horse was entering thereon he slipped and fell to his knees. By the time the horse had regained his feet plaintiff concluded he could not get across because the car was only three houses away, so he signaled to the motorman and turned his horse to the left and north and went up the track on Grandy street about 45 feet, at which point the street car collided with his wagon, striking it a glancing blow on the right side where plaintiff was standing. The impact threw plaintiff from the wagon and injured him.

Plaintiff counts in his declaration on the negligence of the defendant in operating the car at an excessive rate of speed, in violation of the ordinance of the city, and for the failure of its motorman to slow down and stop the car after he discovered the position of plaintiff.

The trial court was of the opinion that plaintiff's own testimony showed that he was guilty of contributory negligence, and upon that ground he directed a verdict for the defendant.

1. In defending plaintiff from the charge of contributory negligence his counsel invoke the rule that:

"Where, in the exercise of common prudence, a person may reasonably think there is time to cross a street railway safely, he is not chargeable with negligence in attempting it. *Ryan* v. *Railway Co.*, 123 Mich. 597; *Chauvin* v. *Railway*, 135 Mich. 85; *Gaffka* v. *Railway*, 143 Mich. 456; *LaLonde* v. *Traction Co.*, 145 Mich. 77." *Seebach* v. *Railways Co.*, 177 Mich. 1.

If plaintiff were guilty of contributory negligence as a matter of law, it did not lie in his attempt to cross the track when the car was a block away (*Purulewski* v. *Railway*, 181 Mich. 133; *Millette* v. *Railway*, 186 Mich. 634), but it lay in his failure to go on across as he had started instead of turning to the left. He says he thought he did not have time to cross and

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therefore turned his horse and drove in a northerly direction parallel with the track a distance of 45 feet. His own testimony on this phase of the case is of interest:

"When his front legs were on the car track the horse was walking, a good walk. The car was then about 3 houses off. It was then going too fast to get over. 90 feet away from me when the horse's front feet were on the car track and I saw the car was coming too fast to get all the way over. I then turned my horse on the left side and started to holler. When my horse was struck I was passing Theodore and driving up Grandy. My horse was up Grandy about one house when I was struck. My horse walked 20 feet to the car track and then up Grandy past one house or opposite one house while this car was running 90 feet. It was about 30 feet up Grandy from the north corner of Theodore street where I was struck and my horse was walking all the time. I could not stop my horse and back him off the track when I could see that the street car was 90 feet away and coming too fast because it was awfully hard to back up in the snow.

"*Q.* Yet it wasn't awfully hard for him to walk up to that house 30 feet past Grandy?

"*A.* I thought I would be safe.

"*Q.* You had time—the horse had time to walk 30 feet up Grandy—up Theodore, before he was struck?

"*A.* Yes, sir."

Something must be, and is, allowed for error of judgment in such cases but the exercise of judgment which prompts one to turn and drive along a track for a distance of 45 feet to avoid an approaching car when a third of the distance would have taken him across the track to a place of safety, is so contrary to what the average man of ordinary prudence would do under similar circumstances that we think plaintiff's act should be declared contributory negligence as a matter of law.

Plaintiff cites the cases of *Purulewski* v. *Railway*,

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and *Millette* v. *Railway*, *supra*, in support of his contention. It is true that these cases involved error of judgment in crossing a street railway track but in both cases the drivers proceeded to cross and would have crossed in safety had not fortuitous circumstances, combined with defendant's acts of commission and omission, intervened and prevented. If plaintiff had proceeded across the track and his wagon had been struck by reason of his delay due to his horse stumbling, the foregoing cases would sustain his contention that he had a right to go to the jury on the question of contributory negligence, but instead of doing this plaintiff chose a course which from any aspect would have taken him longer to clear the track than to go across. We agree with the trial court that plaintiff was guilty of contributory negligence as a matter of law.

2. The claim of subsequent negligence was not sustained. There was no showing how fast the car was running nor was there any showing that the car could have been stopped after its motorman discovered that plaintiff was unlikely to clear the track. The judgment of the trial court is affirmed.

STEERE, BROOKE, and FELLOWS, JJ., concurred with BIRD, J.

KUHN, J. I concur in the conclusion of Justice BIRD that, under the circumstances of this case, the plaintiff should be held guilty of contributory negligence as a matter of law, but I am unable to concur in his holding that there was not sufficient evidence of the claim of defendant's subsequent negligence to submit that question to the jury. It is said in his opinion:

"There was no showing how fast the car was running nor was there any showing that the car could

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have been stopped after its motorman discovered that plaintiff was unlikely to clear the track."

While the record does not disclose the exact speed at which the car was running, in my opinion there was sufficient evidence to sustain the claim that it was running at a high rate of speed. In the consideration of the question whether, under the circumstances, a verdict should have been directed, the evidence in support of plaintiff's claim must be considered in the light most favorable to his contentions. Mr. Hildebrandt, the plaintiff, testified that he had gone about 30 feet up Grandy avenue when the car struck the wagon, and the street car, after striking him, carried him some distance—the exact number of feet is not disclosed by the record. If the motorman had his attention upon the condition of the track in front of him, the claim seems reasonable that he did see, or should have seen, the plaintiff with his wagon in the predicament that he was in. The record shows that the horse slipped and fell several times just as he reached the first rail of the track, and that it must have taken some time for the plaintiff to have pulled the horse around on the track and for the horse to have traveled 30 feet before he was struck. According to the testimony of plaintiff's witnesses, during this time no effort was made by the motorman to get his car under control, but it struck the plaintiff's wagon at full speed. In my opinion the situation here presented comes within the ruling of this court in *Walter* v. *Railway Co.*, 191 Mich. 181, in which opinion a large number of authorities from this State are cited, holding that, under similar circumstances, a question of fact for the jury was presented.

The judgment should be reversed and a new trial ordered.

OSTRANDER, C. J., and MOORE and STONE, JJ., concurred with KUHN, J.

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PAINE *v.* SAULSBURY.

CORPORATIONS—DISSOLUTION—STATUTES.

Where, on appeal by minority stockholders from a decree of the court below, granting the dissolution of a mining corporation, under sections 13563, 13577, 3 Comp. Laws 1915, it appears that it is a solvent, prosperous, going concern with a large cash surplus, and it does not appear to be the intention to discontinue the business of mining and distribute its assets among the stockholders, but the effect would be that a holding corporation would acquire, by force of dissolution, the stock of the minority stockholders, which it was unable to acquire by purchase in the open market, the decree of the court below will be reversed. FELLOWS, J., dissenting.

Appeal from Houghton; O'Brien, J. Submitted June 15, 1917. (Docket No. 50.) Decided March 27, 1918.

Petition by William A. Paine and others for the dissolution of a mining corporation. From a decree for petitioners, Willard E. Saulsbury and another, minority stockholders, appeal. Reversed.

Stone, Wieder & Schulte (*Dan H. Ball,* of counsel), for petitioners.

J. F. Hambitzer and *Hugh M. Morris,* for appellants.

BIRD, J. In pursuance of a resolution adopted by the directors of Trimountain Mining Company, they filed their petition in the Houghton circuit court, on October 25, 1916, praying for an order dissolving said corporation. The resolution is as follows:

"Whereas, the average annual net earnings of this company for the 14 years next preceding the present year have been only $2.22 for each share, without making any deduction for depletion of the mineral deposits in its mine;

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"And, Whereas, the Copper Range Company, operating mines adjoining that of this company, is the holder of more than (99/100) of the capital stock of this company, and has offered to buy from the holders thereof the remainder of said stock and to issue in payment therefor, an equal number of shares of its own stock, which offer the holders of said stock refuse to accept, although the net earnings of the Baltic mine, one-half of the net earnings of the Champion mine, and the net earnings of the Copper Range railroad, all of which belong to said Copper Range company, have been, for said 14 years previous, and still are, nearly twice as much per share as the net earnings of this company;

"And, Whereas, said Copper Range Company has offered, and still offers, to bind itself to bid for the mine and property of this company, in case of dissolution and public sale of its property, the sum of $6,000,000, amounting to $60 per share of its capital stock;

"And, Whereas, the earnings of this company as aforesaid, amount to only 3 7/10 per cent. per annum on the sum that would be realized on such sale, if made on the bid of said Copper Range Company, and will cease with the exhaustion of the mine, while the money so realized on such sale would yield at least 5 per cent. interest in perpetuity, thus yielding a larger annual return in perpetuity to each stockholder than can be realized by them from the operation of the mine for only a limited period;

"And, Whereas, this company has no railroad for the transportation of its rock to stamp mill, and is dependent upon the Copper Range railroad therefor;

"And, Whereas, the stamp mill of this company has been destroyed by fire, making it necessary to build a new mill, at an expense of about $500,000, if it continue to operate its mine, or to pay for the treatment of its rock, in either case materially reducing its earnings, at least until a new stamp mill can be built;

"Therefore, Resolved that the directors of this company deem it highly beneficial to the stockholders that it should be dissolved, and that its mine and other property be sold under decree of court and that the proceeds thereof be distributed among the stockholders."

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Saulsbury and Foley, the respondents, answered, denying certain conclusions stated in the petition, and denying that the resolution of the board and petition contain sufficient reasons why the company should be dissolved. And they charge that because of interlocking directors in the Trimountain and Copper Range companies, the directors of Trimountain company were in no position to act or vote on the foregoing resolution.

At the hearing some additional facts to those set up in the petition were shown, which are in substance:

(*a*) That respondents bought their stock consisting of 300 shares as an investment prior to the year 1900, and they have ever since held it as an investment, believing that it was a good investment, and are desirous of retaining it.

(*b*) That four of the directors of Trimountain company are directors and constitute a majority of the board of directors of Copper Range company. That the four directors have only nominal interests in the Trimountain but have large investments in Copper Range.

(*c*) That the Trimountain Mining Company produced 8,302,896 pounds of refined copper in the year 1915, and 8,720,000 pounds in the year 1916.

(*d*) That the company's net earnings in 1915 were $654,746.52, and that it earned over 12 per cent. in 1916, and no dividend was paid in either year.

(*e*) That at the time of the hearing its cash surplus over and above its indebtedness amounted to approximately $2,000,000, which stood to its credit in a Boston National bank.

(*f*) That the outlook for the production of copper is very promising and the price received therefor higher than for many years.

(*g*) That within recent years the mine has been developed and is now fully equipped with modern iron

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shaft houses, boiler houses, stores, mine residences and numerous other buildings at its stamp mill site and at its mine site, and that the mine has been sunk to a considerable depth and miles of drifting has been done through the lode to develop and locate the copper deposits.

(*h*) That Copper Range Company is not a mining corporation but a holding company, owning at the present time all of the Baltic, one-half of the Champion, and all of the Trimountain except the 300 shares owned by respondents. That it also owns all of the stock of the Copper Range railroad.

These proceedings are statutory and are dependent upon chapter 40 of the judicature act (Act No. 314, Pub. Acts 1915, 3 Comp. Laws 1915, §§ 13563-13577). This law first came into our statutes by force of Act No. 56 of the Laws of 1839, and has remained without substantial change until the present time. The principal use made of the statute during the intervening years has been to aid in dissolving corporations that were insolvent, or in failing circumstances, or where the object for which they had been incorporated was at an end. The act is now invoked to aid in dissolving a solvent corporation, a prosperous going concern with a large cash surplus. These circumstances make it incumbent upon the court to examine the reasons stated in the petition for dissolution with much closer scrutiny than it would had the question of insolvency or threatened insolvency been involved. (*White* v. *Kincaid*, 149 N. C. 415, and cases cited.)

That part of the act calling for construction is sections 1 and 4.

"SECTION 1. Whenever the directors, trustees or other officers having the management of the concerns of any corporation, or the majority of them, shall discover that the stock, property and effects of such corporation have been so far reduced by losses or otherwise, that it will not be able to pay all just de-

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mands to which it may be liable, or to afford a reasonable security to those who may deal with such corporation, or whenever such directors, trustees or officers, or a majority of them, shall, for any reason, deem it beneficial to the stockholders that such corporation should be dissolved, they may apply by petition to the court of chancery for the county wherein said corporation is located for a decree dissolving such corporation, pursuant to the provisions of this chapter: *Provided*, that the provisions of this chapter shall not extend to any incorporated library or lyceum society; to any religious corporation; to any incorporated academy or select school not organized for pecuniary profit; nor to the proprietors of any burying ground incorporated under the laws of this State."

"SECTION 4. On the day appointed in such order such court or circuit court commissioner shall proceed to hear the allegations and proofs of the parties and shall take testimony in relation thereto, and in case of a circuit court commissioner shall, with all convenient speed, report the same to the court with a statement of the property, effects, debts, credits, engagements and conditions of such corporation. Upon said hearing before the court or upon the coming in of the report of the circuit court commissioner, if it shall appear to the court that such corporation is insolvent or that for any reason a dissolution thereof will be beneficial to the stockholders and not injurious to the public interest, a decree shall be entered dissolving such corporation and appointing one or more receivers of its estate and effects; and such corporation shall thereupon be dissolved and shall cease." * * *

Both counsel have devoted much space in their briefs to the precise physical and financial condition of the Trimountain company; also its relative value to the Copper Range company. The purpose of petitioner in so doing was to show that the offer of exchange made to respondents was a fair and equitable one. From the same data respondents' counsel argue that the offer is inequitable and unfair. We shall not attempt to follow counsel in these discussions, but will content ourselves with the conclusion, which is amply support-

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ed by the testimony, that the Trimountain company which is sought to be dissolved is a solvent corporation, a prosperous going concern, earning large dividends at the present time and capable of earning a reasonable return on the capital invested for many years to come.

Counsel are not in accord as to the power of the court to inquire into the motive of the directors in asking for a dissolution under a statutory provision like the present one. The rule of construction in such cases has been stated as follows:

"At the present time there are statutory provisions in many jurisdictions in this country and in England which expressly provide for the voluntary dissolution of business corporations at the instance of the directors, usually with the consent of a certain proportion of the stockholders. Such a statutory provision enters into every charter, and every stockholder takes and holds his stock subject to this power of voluntary dissolution, and when the board of directors have determined, in their best judgment, that the corporation should be dissolved, and are pursuing the methods specified by the statute, it is only in rare and exceptional cases that their action will be stayed or interfered with by the courts. On the other hand, if it clearly appears that the action is in bad faith, that the resolution for dissolution has been superinduced by undue influence or fraud, or if it is clearly established that the resolution was not taken for the benefit of the corporation or in furtherance of its interest, but for the mere purpose of unjustly oppressing the minority of the stockholders, or any of them, and causing a destruction or sacrifice of their pecuniary interests or holdings, giving clear indication of a breach of trust, such action may be restrained." 7 R. C. L. p. 709, citing *White* v. *Kincaid, supra.*

In the last case cited, after stating the foregoing rule, it is observed that:

"Such cases almost invariably arise when the management of a solvent concern, going and prosperous,

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ceases operations and determines to dissolve and sell out, with a view of continuing the same or similar business under different control, and when there is indication given that the sole purpose was to oppress some of the stockholders and confiscate their holdings, or when it is done in furtherance of some scheme to promote the pecuniary interest of the actors, and to the detriment of the corporation, giving indication of a breach of trust on the part of the authorities in charge and control of the corporate affairs."

The testimony of directors Paine and Denton, together with the frankness of counsel, are very persuasive that the sole purpose of the application is to get rid of respondents as stockholders and acquire their holdings, and that, had the Copper Range company been able to purchase or exchange its own shares for respondents' holdings, the petition would never have been filed. The testimony of Mr. Paine shows that the Copper Consolidated Company, a New Jersey corporation, and predecessor of the present Copper Range Company, began to acquire Trimountain mining stock in the year 1903; that in that year a large amount of stock was acquired by exchange of shares. That the offer was renewed in the year 1915 in order to acquire the balance of the outstanding stock, the offer being to exchange Copper Range stock for Trimountain stock, share for share, and that all of the stockholders of Trimountain accepted the offer save these two respondents. Upon this phase of the case a portion of the cross-examination of Capt. Denton is interesting. He testified that:

"The matter of dissolving the Trimountain Mining Company was talked over by the directors of the two companies. It would be mutually advantageous and I presume would be the better way to get the outstanding stock. We were advised that that would be the better way to get the outstanding stock. Buy the whole thing. I think that is it essentially, we advised the directors of the Copper Range and the directors

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of the Trimountain that it would be a good plan. It was a mutual arrangement made at one time. We only had to see the directors of the Copper Range, only had to see two of the directors of the Trimountain who were not on the Copper Range directorate. Four of us are directors on the Trimountain and Copper Range. The majority of the Trimountain directors were directors of the Copper Range and were dealing with the Trimountain as directors of the Copper Range with themselves as directors of the Trimountain. That was the situation. * * * Yes, it is still the desire of the Copper Range to acquire title to the Trimountain and I have encouraged the action of the Trimountain directors.

"*Q.* But you do know the Trimountain can be made a profitable mine?

"*A.* I think we have made it profitable.

"*Q.* You have made it profitable already, and were it not for the fact that the Copper Range Company desired it in connection with its own operations, if it stood alone without any mine near it, you would still think it a mine that could be profitably worked if well managed?

"*A.* Certainly, it is a profitable mine and should be operated.

"*Q.* That is standing alone and without anything else, you would not think it should be dissolved and the proceeds divided?

"*A.* Not standing alone. It should be operated."

We, therefore, have before us a petition to dissolve a corporation under the statute in order that a holding company, another corporation, may acquire, by force of dissolution proceedings, what it has been unable to acquire by purchase or exchange in the open market. It does not appear to be the intention to dissolve the corporation and discontinue the business of mining and distribute its assets among the stockholders, because beneficial to them, nor does it appear to be desired because of any inherent physical or financial weakness in the organization or its property, but it appears to be desired for the reason that the Copper

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Range Company may become the owner of all the shares instead of a portion of them. The idea back of this desire is said to be that the cost of operation can be materially reduced if the property can be operated as a unit with Baltic and Champion. This may be so and perhaps is commendable as a business proposition, but it is no measure of respondents' rights. The respondents made their investments when the mine was more or less of a speculation. They have been loyal and retained their investments through the years of physical development and financial vicissitudes, and now when the project has proved to be a success, if counsel's contention is to prevail, they may be driven out by a forced sale of their investment for no better reason than that a larger stockholder desires to acquire it in the interest of economy. It is not conceivable that the legislature ever intended that the statute should be used for such a purpose. To give the statute this construction would open the way to the majority interest of every corporation in the State to dispose of an offensive minority in the same way if it saw fit. Such a construction would be injurious to the public interest and not beneficial to the stockholders as a whole. For a similar case upon the law and facts and one which answers many of the arguments of the petitioner in this case, see *Theis* v. *Gas Light Co.*, 34 Wash. 23.

Counsel have argued the second contention of respondents that the petition is of no legal force because after the four interlocking directors had sat around the Copper Range table and determined that it was for the best interest of the Copper Range company to acquire all the shares of the Trimountain company, they were in no position, mentally, to gather around the Trimountain table and determine what was best for that company. As our view of the first question disposes of the case it will be unnecessary to consider

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this one further than to say that the action of the directors in this respect has contributed to our conviction that the application is not a good faith application under the statute.

The order of the trial court must be set aside and the prayer of the petition denied. Respondents will recover their costs in both courts.

BROOKE and KUHN, JJ., concurred with BIRD, J.

OSTRANDER, C. J. The peculiar facts in this case lead me to concur in the result reached by my Brother BIRD.

MOORE and STEERE, JJ., concurred with OSTRANDER, C. J.

FELLOWS, J. (*dissenting*). I do not agree with the conclusion reached by Mr. Justice BIRD in this case. As I conclude that the decree appealed from should be modified and affirmed it becomes necessary to notice the legal objections made to it. These objections are two and only two in number:

First. That a solvent corporation may not be dissolved under this statute.

Second. That these proceedings must fail because a majority of the Trimountain board of directors are also directors of the Copper Range.

I think it unnecessary that we decide the frequently mooted question of whether a court of equity has the inherent power, independent of the statute, to order the dissolution of a going concern. The courts are not in entire accord on this question, and many of the authorities cited by defendants are cases where individual stockholders have sought by bill in equity to take the management of solvent concerns out of the hands of the board of directors, place them in the hands of a receiver, dissolve the company, and wind up its affairs through the courts. With reasonable

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unanimity it has been held that only in exceptional cases may this be done. I think, in the consideration of these cases, we should constantly keep before us the manner in which the question has arisen, lest we are led to believe that the trend of decision is against the power of a court of equity to dissolve a solvent corporation, and overlook the fact that in these cases the court is dealing with its inherent power and not with a power conferred upon it by statute, and where the proceedings are instituted by the managing board of the corporation. Nor should we, on the other hand, follow that line of cases cited by the plaintiffs, where the courts have held that when the statute required a dissolution on the vote of a certain percentage of the stockholders, the right to dissolve is absolute on the requisite percentage of stockholders casting their votes for dissolution, irrespective of the motives of the stockholders. Neither of these two lines of cases is controlling here. Under this statute neither the stockholders in any percentage, nor the board of directors have the power to dissolve the corporation. The sole power of the managing board, as we shall presently see, is to initiate the proceedings. The power, and the only power, to dissolve rests in the court and it rests nowhere else. The court may decree dissolution if the corporation is insolvent, but this is not the limit of its power. It may also decree dissolution if "*for any reason* a dissolution thereof will be *beneficial to the stockholders* and not injurious to the public interest." The court may dissolve in case of insolvency, and it may also dissolve when beneficial to the stockholders, whether insolvency exists or not.

"Beneficial to the stockholders." Does this contemplate that the court may not act and ought not to act where it is beneficial to over 99 per cent. of the stock? Where this per cent. of stock will be greatly benefited and the rights of the balance may be fully protected,

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simply for the reason that the small minority object, and object for no more substantial reasons than are given in the evidence offered by them, that they have held the stock a long time and do not want to exchange it for Copper Range and want the Trimountain to continue as a separate company? I think not. One who purchases stock in a corporation buys it knowing that it is subject to all the laws of the State, including the one under consideration. An examination of some of the authorities will be helpful. We naturally turn to the New York cases first, as our statute is taken from that State. In the case of *In re Niagara Ins. Co.*, 1 Paige, 258, the owners of three-fourths of the stock favored the dissolution, one-ninth opposed it and the balance were indifferent. The chancellor ordered the dissolution and announced the rule which was to guide in such cases, in the following language:

"The court is not bound to decree a dissolution merely because a majority of the directors and stockholders request it to be done. But when the owners of a very large proportion of the stock find it for their interest to vest their capital in something more productive, it is strong evidence that the interest of the stockholders generally will be promoted by allowing them to withdraw their capital and discontinue the business of insurance. In such a case, the particular interest of the few must give way to the general interest of the many."

In *Hitch* v. *Hawley*, 132 N. Y. 212, the statute was under consideration and it was said by the court:

"Where, however, a majority of the trustees favor dissolution 'for any reason,' whether relating to the management or not, and it appears that 'for any reason' a dissolution 'will be beneficial to the interests of the stockholders and not injurious to the public interests, the court must make a final order dissolving the corporation.' As it is not claimed that the public interests are here involved, the only question is whether the facts permitted the conclusion that a dissolu-

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tion would benefit the stockholders. * * * The benefit meant is a pecuniary benefit, either direct or indirect."

This case is also authority to the point that the opinion of the owners of a majority of the stock is of prime importance.

A very interesting and recent case is *Bowditch* v. *Jackson Co.*, 76 N. H. 351, where several of the questions here involved are discussed. Mr. Justice Peaslee, speaking for the court, there said:

"The plain common-sense of the matter is that this is a business venture, to be carried on as such so long as it appears to be good business judgment to do so. When the time comes that a majority in interest believe that their affairs should be wound up and the proceeds distributed, the rational rule is that this should be done. And since the question here is of a business nature, and the limitations of the power of the majority are fixed by the understanding of the business men who made the original compact, business considerations have more than ordinary weight in determining what the contract was."

Speaking on the question of the power to dissolve a solvent corporation, he said:

"If the majority may sell to prevent greater losses, why may they not also sell to make greater gains? Bearing in mind that this is purely a business proposition, with no public rights or duties involved, there seems to be no substantial difference between the two cases, as a matter of principle. In each case, the sale is made because it is of advantage to the stockholders."

In *State* v. *Woolen Mills Co.*, 115 Tenn. 266, the court dissolved a solvent corporation, one just organized and before it had entered upon its business. I quote the syllabus:

"A majority of the stockholders in a private business corporation may voluntarily surrender the charter, and abandon, discontinue and dissolve the corpo-

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ration upon terms of equality to all stockholders over the protest of the minority stockholders before the corporation had purchased any property, incurred any debts, or accomplished anything more than a temporary organization, and where it appears that the stockholders would not be materially prejudiced or financially injured by the dissolution and discontinuance, except as to prospective and speculative profits; and the dissolution will be decreed by the court in a proper suit for that purpose in order to avoid future complications and possible liabilities."

See, also, *Treadwell* v. *Salisbury Manfg. Co.*, 7 Gray, 393; *Trisconi* v. *Winship*, 43 La. Ann. 45.

The case of *White* v. *Kincaid*, 149 N. C. 415 (23 L. R. A. [N. S.] 1177), cited by my Brother BIRD, was a bill filed by an individual stockholder to restrain dissolution of a solvent corporation by its board of directors. The court declined this relief. I quote the syllabus:

"The courts will not, save in rare and exceptional instances, interfere at the suit of minority stockholders of a corporation with proceedings of a majority to dissolve it as authorized by statute."

I think the case of *Theis* v. *Gas Light Co.*, 34 Wash. 23, also cited by my Brother BIRD, is clearly distinguishable from the instant case. In that case, without any benefit to any one, the old corporation was dissolved and a new one created to get rid of plaintiff, the owner of 8 shares of stock, who was styled an uncongenial minority stockholder. In the instant case, as I shall presently discuss, the owner of 99.7 per cent. of the stock of the Trimountain will be benefited to the extent of many thousands of dollars. Indeed, the opinion of Mr. Justice BIRD concedes it to be "commendable as a business proposition," but thinks it does not measure defendants' rights. Reliance is had in the *Theis Case* on section 670, 3 Cook on Corporations (7th Ed.), and *Kean* v. *Johnson*, 9 N. J. Eq. 401. An

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examination of Mr. Cook's work shows that the section there relied upon is found in the chapter on "*Ultra Vires* Acts and Contracts," where the author was considering the power of the directors to sell all the corporate property, while in the chapter on "Dissolution," he says:

"There has been much doubt as to whether minority stockholders may prevent a dissolution under a statute, where the purpose is to sell the property to another company. The weight of authority seems to hold that such a dissolution is legal, if no actual fraud is shown and if a public sale of the property is provided for." 2 Cook on Corporations (7th Ed.), § 629.

The New Jersey case cited in the *Theis Case* was considerably weakened by what was said by the same court in *Black* v. *Canal Co.*, 22 N. J. Eq. 130 (see p. 404). I do not think the *Theis Case* should be followed under the facts in the instant case.

It is fair to assume that upon a receiver's sale of the Trimountain property, in all human probability the Copper Range company will be the purchaser. This company, by reason of the situation, can afford to pay more for it than any other company or any individual. The Trimountain lies between two of its subsidiary companies, the Baltic and Champion. By doing this the overhead expense of maintaining duplicate organizations, a very large sum under existing conditions, may be avoided. It appears that the Baltic has a capacity at its stamp mill to accommodate the output of the Trimountain, and by a dissolution the expense of building a stamp mill on the Trimountain will be saved. It is admitted that this expense would be at least $500,000. Of this sum the majority stockholders would have to pay nine hundred and ninety-seven one-thousandths, or $498,500, while defendants would have to pay but $1,500. Are the rights of these minority contestants of such overweening and

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paramount importance as to justify a court of equity in laying upon the majority stockholder this enormous and wholly unnecessary expense in order that they may continue to hold the stock in the Trimountain instead of having the full value of such stock paid them in cash to be used for other investment? In other words, are the rights of these 3/10 of one per cent. of the stock of this corporation so sacred that the other 99 7/10 per cent. must expend nearly half a million dollars in order to keep the old company intact? Is a court of equity justified in requiring this useless expense of half a million of corporate funds? I think not. There are 100,000 shares of stock in the Trimountain company; the Copper Range owns 99,700 of them, defendants 300. If this entire stock was held equally in 100 share blocks there would be 1,000 shareholders. If such were the case would a court of equity turn a deaf ear to 997 of the shareholders if they were asking a dissolution in the interest of economy in management, economy in the expenditures I have noted and others which might be mentioned, and listen only to the three shareholders who might desire, as a matter of sentiment, to keep the old company going, to say nothing of the opportunity for holding up the majority stockholders, thus exacting a fancy price for their fraction of one per cent. of stock? What difference is there in the underlying principle, whether the majority of the stock is held by 997 shareholders or by one? None whatever. It appears beyond question, upon this record, that it is beneficial to the overwhelming majority of the stock that this dissolution take place.

I am persuaded that defendants would also be benefited by a dissolution of this company, and the sale of its property at the present time. It is a good time to sell property when there is an anxious purchaser ready to buy. This record discloses that the copper

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industry is now enjoying an unprecedented era of prosperity. How long this will continue no one can foretell. This property is now actually worth and will sell for more cash than ever before in its history. We are dealing with a business proposition, not with theories or speculation; with pecuniary interests, not with sentiment. I am clearly of the opinion from this record that the interests of all stockholders will be benefited by a sale, under such circumstances as will protect the interests of all.

The directors are the trustees for all the stockholders, minority as well as majority, and their actions must be scrutinized and examined with that relation in view. As defendants contend, they may not, as such trustees, sell to themselves all the corporate property, nor may they sell all the corporate property to any one else. If they were making a sale by themselves to themselves, or to a company in which they were interested, another question would be presented. Neither the company nor the board of directors are selling, or contracting to sell, this property. In this proceeding the court is in fact making the sale. *Peirson* v. *Fisk*, 99 Mich. 43. No sale becomes effective until reported to and confirmed by the court. All the board of directors have done, and all they are authorized to do under this statute, is to initiate the proceedings—to place the matter in the hands of the court. When the sale is finally made it is made by the court. I discover no reason which would prevent the board of directors, trustees for all the stockholders, from initiating these proceedings in a court of equity, and placing the question of a sale of the property in the hands of the chancellor; nor have I been able to discover any place where this board of directors has in any way disregarded their trusteeship, or in any manner neglected the interests of all the stockholders.

This property must be sold for cash. Defendants

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cannot be required to take stock in another company. *Lauman* v. *Railroad Co.*, 30 Pa. St. 42; *Francis* v. *Taylor*, 65 N. Y. Supp. 28; *Slattery* v. *Development Co.*, 128 La. 871. Upon such sale an upset price should be fixed. This case has been appealed to this court and we are hearing it *de novo*. I think there is sufficient upon this record from which we are able to fix such upset price. The Copper Range company some years ago offered what would amount to $6,000,000 for this property. I think we may assume that it was then worth that amount. Since that time its surplus has increased until at the end of 1916 it amounted to $2,000,000. The case was tried during the year 1917, so that the figures for that year are not before us, but the record indicates and all seem to agree that it would be a prosperous year. I think that, taking all the facts in the record into consideration, we may fairly fix as an upset price the sum of $10,000,000.

I think the construction here given the statute carries out the legislative intent, protects the rights of all, and will prevent its oppressive use, either on the one hand to "freeze out," as it is called in the *Theis Case*, uncongenial minority stockholders, and on the other prevent hold-ups by owners of small amounts of stock.

I think the decree of the court below should be modified by fixing an upset price of $10,000,000, and in all other regards affirmed. Defendants should recover costs of this court.

STONE, J., did not sit.

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CHICAGO, DETROIT & CANADA GRAND TRUNK JUNCTION RAILROAD CO. *v.* SIMONS.

1. EMINENT DOMAIN—DAMAGES—BASIS OF AWARD—GENERAL RULE.
It is the general rule that the tribunal whose duty it is to determine the value of land taken by eminent domain is not limited to the value of the land or the purpose for which it is actually used, but may consider all uses to which it is adapted and might be put, and will award compensation upon the basis of its most advantageous use.

2. SAME—INADEQUATE AWARD.
An award of compensation based upon the value of the land for farming purposes, although within the range of the testimony, will be set aside by the Supreme Court as inadequate, where the uncontroverted testimony on the part of respondents showed that the value of the land for subdividing and platting purposes was much in excess of what it was worth for farming.

3. SAME—ARGUMENT OF COUNSEL—JURISDICTION.
As to the power of the Supreme Court to set aside the award on the ground of intemperate argument of counsel to the jury,—*quære.*

Appeal from Macomb probate court; Reid, J. Submitted April 11, 1917. (Docket No. 133.) Decided March 27, 1918.

Condemnation proceedings by the Chicago, Detroit & Canada Grand Trunk Junction Railroad Company against David W. Simons and others to acquire certain land for railway purposes. From an order confirming the award of the jury, respondents appeal. Reversed.

Lungerhausen & Lungerhausen (*W. T. Hosner* and *Charles C. Simons,* of counsel), for appellants.

Harrison Geer, for appellee.

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BIRD, J. Plaintiff, being desirous of establishing switching yards in the vicinity of the eight-mile road north of the city of Detroit, filed a petition in the probate court for Macomb county to condemn two parcels of land lying along and adjacent to its right of way. One parcel contains 6.20 acres, the other 10.39 acres. On these parcels it is intended to construct 30 railway tracks over which 2,000 cars will be handled every 24 hours. A jury of 12 men were empaneled and heard the proofs touching the necessity and the value thereof.

The 6-acre parcel is taken from a 40-acre tract owned by defendants Simons, Beymer and Abbott. Its southern boundary is the eight-mile road, otherwise known as the county line between Wayne and Macomb counties, and is situated three miles north of the city limits. It lies within a mile and a half of the Gratiot avenue street car line and three-quarters of a mile from the VanDyke line. It was first platted in 1892 and replatted again in May, 1916, and contains 371 lots.

The 10-acre tract is owned by defendants Fuller and Becker. It lies northeast of the 6-acre tract and has a frontage on the nine-mile road, and is said to be well adapted for platting and subdivision purposes and especially for factory purposes.

Petitioner produced seven witnesses, six of whom were farmers, who valued the six acres at $400 per acre and the ten acres at $200 to $250 an acre; this estimate to include the damages to the remainder of the tract. Defendants' witnesses were mostly real estate men, who placed the value for subdividing and platting at from $1,000 to $1,500 per acre for the six acres and $1,000 to $1,200 for the ten acres. The parcels were estimated by petitioner's witnesses to be worth for farming purposes from $150 to $300 an acre.

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The jury awarded the sum of $400 an acre for the 6-acre parcel and $350 an acre for the 10-acre parcel, these sums to include the damages to the tracts from which the parcels were taken. The award was subsequently confirmed by the probate court. Defendants filed objections thereto and appealed to this court. The objections, in substance, are that:

1. The award as to each parcel is grossly inadequate.
2. That the jury adjudged the damages solely from what the lands were worth for farming purposes.
3. Because of the inflammatory argument of petitioner's counsel.

1. While the statute confers upon this court appellate jurisdiction to review awards made in railway condemnation cases, it has always been very loth to reverse them on technical grounds, or because the damages were apparently excessive or inadequate, if they were within the range of the testimony. These awards are within the range of the testimony and, therefore, I am of the opinion that the awards should not be set aside solely on the ground covered by the first objection that they are grossly inadequate. I am impressed, however, after studying the record, that the second objection considered in connection with the first one is well taken. The amount of the awards, together with the testimony, is very convincing that the jury awarded damages for the parcels based solely on their value for farming purposes. It is urged by respondents that the parcels were more valuable for platting or subdivision purposes than for farming purposes. If they were, the owners had a right to have the damages assessed on that basis. Mr. Justice CAMPBELL, in reviewing proceedings to take lands for railway purposes just outside the city of Grand Rapids, said:

"We think that where land so situated is condemned the jury should consider it in all its bearings and not as valuable for one purpose only. An owner has a

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right to be indemnified for anything he may have lost. The farming test, which is the one petitioner sought to apply, would be of no particular use in a great many cases of suburban lands." *Grand Rapids, etc., R. Co.* v. *Chesebro*, 74 Mich. 466.

The general rule is stated elsewhere, as follows:

"The tribunal whose duty it is to determine the value of land taken by eminent domain is not limited to the value of the land or the purposes for which it is actually used, but may consider all uses to which it is adapted and might be put, and will award compensation upon the basis of its most advantageous and valuable use." 10 R. C. L. 130, and cases cited.

In *Missouri, etc., R. Co.* v. *Roe*, 77 Kan. 224, it was held that:

"The plaintiff was entitled to compensation according to the most advantageous and profitable use he could make of his land," and further that "the defendant could not insist that the plaintiff treat his entire holdings as a farm in order to minimize his damages."

The petitioner proceeded throughout on the theory that the tracts from which the parcels were taken were farming lands. It is asserted and not denied that the witnesses were interrogated by petitioner's counsel as to the value of the parcels for farming purposes and for no other. Petitioner's witnesses expressed their opinions as to the value of the parcels for farming purposes and added a sum to those values for detaching a portion of the tract and for the damages to the portions remaining. The value fixed by these witnesses agree so nearly with the amount awarded that it is difficult to avoid the inference that the jury awarded damages for the parcels, on the theory that their chief value was for farming purposes. The record shows that the 6-acre tract had been platted in 1892 and was sold by Simons to Abbott and Beymer upon contract for $900 an acre in May, 1916; that $2,000 an acre was paid for the subdivision south

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of it, and another subdivision on the eight-mile road, three-quarters of a mile west, had been subdivided and partially sold; that petitioner had paid $470 per acre for a tract of 38 acres, which lay north and east of the ones involved. Several witnesses familiar with the work of subdivision testified that the 6-acre tract was worth from $1,000 to $1,500 per acre for subdivision purposes and that the 10-acre tract was worth from $1,000 to $1,200 per acre. This showing makes it obvious that these tracts had some value for subdivision and platting purposes, and that such value was far in excess of its value for farming purposes. Persuaded as we are that the jury arrived at the amounts returned by the farming test, we think they proceeded, if not upon a wrong basis, upon a too narrow one, and that little or no consideration was given to the respondents' testimony (which was not controverted), that the value of the parcels for subdivision and platting was much in excess of what they were worth for farming purposes. Because of this the awards must be set aside.

3. Objection is made to the following portion of counsel's argument:

"You have heard the evidence, gentlemen, in regard to the transaction between Mr. Simons and Abbott and Beymer. That deal was put through for the purpose of holding up the railroad company. The land was sold by Simon, not 'Simple Simon,' but David Simon, a Jew, and his nation is the sharpest nation on earth. He made the deal with a couple of real estate sharks, men who make it a business of skinning the public and defrauding and robbing the poor laboring man, the widows and orphans, by their crooked and fraudulent lot selling schemes. Are you going to assist such crooks as these in mulcting this railroad company? They would defraud you if they had the opportunity. I hope, gentlemen, that none of you or your friends ever get into the clutches of these crooks."

This intemperate outburst upon the part of counsel

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was not warranted by the testimony. Indeed, we do not understand that he attempts to excuse it in its entirety. How far it may have influenced the jury upon the question of value and thereby affected the awards, we are unable to say. Whether we should interfere with proceedings under this statute to the extent of setting them aside on this ground we think it unnecessary to decide, as the awards must be vacated for reasons already stated.

The awards must be set aside and an inquest made before a new jury. The respondents will recover their costs in this court.

OSTRANDER, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

E. P. STACY & SONS *v.* MOHER.

1. FOOD—WARRANTY OF FITNESS—DEALERS—IMPLIED WARRANTY—INSPECTION.

   There is no implied warranty of fitness or quality in the sale of articles of food, between dealers, where the buyer has an opportunity to inspect the articles before delivery.

2. SAME—WRITTEN CONTRACTS—TRIAL—INSTRUCTIONS—WARRANTY.

   Where defendant, a retail grocer, purchased of a wholesale dealer a quantity of eggs for future delivery, under written contract, accepting the stock in the condition it was in when it went into cold storage, in an action for the purchase price, the court properly instructed the jury that if, when the goods went into cold storage, they were fit for food and they afterward deteriorated and became

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unfit for food, the loss would be on defendant, there being no claim of fraud or misunderstanding in making the contract.

3. SAME—STATUTES—DEFENSES.

Where the eggs were sound when defendant purchased them, and they decomposed after being placed in cold storage, section 6473, 2 Comp. Laws 1915, making it a misdemeanor to have in one's possession, with intent to sell, any article of food which is diseased, decomposed, etc., is no defense to an action for the purchase price.

4. APPEAL AND ERROR—PREJUDICIAL ERROR—REVIEW.

Where the issue as to defendant's liability was determined by the jury in favor of the plaintiff, and it recovered only the contract price, the admissibility of certain evidence, which appears to be of no consequence, will not be considered, on review.

Error to Chippewa; Fead, J. Submitted October 3, 1917. (Docket No. 3.) Decided March 27, 1918.

Assumpsit by E. P. Stacy & Sons against Jeremiah H. Moher for goods sold and delivered. Judgment for plaintiff. Defendant brings error. Affirmed.

McDonald & Kaltz, for appellant.

Davidson & Hudson, for appellee.

BIRD, J. Plaintiff is a wholesaler of groceries and produce in the city of Minneapolis. Defendant is a retailer of groceries and produce in the city of Sault Ste. Marie. On the 25th day of May, 1914, the parties entered into a written contract by which defendant purchased of plaintiff 175 cases of selected storage eggs for future delivery. That part of the contract material to this controversy follows:

"J. H. Moher, of Soo, Mich., party of the first part, hereby purchase of E. P. Stacy & Sons, party of the second part, and said E. P. Stacy & Sons hereby sell said J. H. Moher one hundred seventy-five cases selected storage eggs for 24 cents per dozen, said price to include cost and storage and insurance to December 31, 1914. Said goods to be delivered as ordered, pro-

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viding said orders shall be given E. P. Stacy & Sons long enough in advance to enable E. P. Stacy & Sons to ship the same.

"It is further provided that all of the eggs purchased are to be ordered, so as to be delivered on or before December 31, 1914, at which time the tender of any balance not ordered out by party of the first part is hereby expressly waived.

"It is also understood between the parties hereto that any eggs not ordered out by the party of the first part at or before the expiration of this contract, shall be charged to said party and immediately paid for; in case said first party fails to take said eggs and pay for same on the expiration of this contract, said second party shall forthwith dispose of said eggs to best advantage for account of said first party. The said first party thereby agrees to reimburse said second party for any such loss as it shall sustain and which shall be charged to account of said first party.

"It is understood that said J. H. Moher accepts said stock as it is when it goes into cold storage, the buyer having the privilege of inspection at time of purchase should he so desire, but after the signing of the contract, it is understood that these eggs shall be accepted 'at mark' and not candled by E. P. Stacy & Sons when taken out of cold storage, nor shall said E. P. Stacy & Sons sustain any loss that may occur from the buyer candling the same."

The eggs were afterwards purchased, placed in the Booth Storage warehouse in Minneapolis, and later in the season were shipped by plaintiff to defendant as he needed and ordered them, and they were sold by him to his customers save 24 cases, which, he claims, were spoiled. He returned the 24 cases to plaintiff at Minneapolis and refused to pay for them. It was to recover the contract price of these eggs that plaintiff brought this suit. The jury awarded plaintiff a verdict for the contract price of the eggs.

1. The principal complaint made by defendant is directed at the interpretation which the trial court gave to that part of the contract, which appears in

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italics. Based upon that portion of the contract, the jury were instructed that:

"If you find that when the goods went into cold storage they were fit for food purposes, the defendant, Mr. Moher, would not afterwards be entitled to any defense that they became afterward unfit for food. In other words, the condition of the eggs at the time they went into the cold storage would govern the rights and liabilities of the parties in this suit.

"The eggs which were to go into cold storage were, under the contract, selected storage eggs, and as I said, they must have been, in order that the plaintiff be entitled to recover for them, they must have been fit for food purposes at the time they went into cold storage. If they were so fit and they deteriorated afterward that loss would be to the defendant, Mr. Moher, under the contract."

Counsel contends that this instruction was error because "an implied warranty attaches to the articles at the time of the delivery to the buyer—that they are fit then for the purposes contemplated by the contract, namely, for sale by the buyer to the customers." Had this been the ordinary sale and delivery of an article of food counsel's contention would be quite right, provided plaintiff had had no opportunity to inspect it before delivery (*Copas* v. *Provision Co.*, 73 Mich. 541), but if opportunity had been afforded him to inspect the article before delivery, no implied warranty of fitness or quality would have arisen between plaintiff and defendant because both were dealers. *Baker* v. *Kamantowsky*, 188 Mich. 569.

But this was not the ordinary sale and delivery of an article of food. It was a sale by written contract made by parties who were cognizant of the fact that if the eggs were kept in cold storage until the following winter that some loss was likely to ensue, and the burden of that loss was assumed by defendant in language which is unmistakably plain and unambiguous. There is no claim of fraud or misunderstanding at-

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tending the making of the contract. On the other hand, it appears to have been the deliberate act of the parties with a full understanding of the obligations imposed, and we see no valid reason why it should not be enforced as made. We think the interpretation given to it by the trial court was the proper one.

2. Counsel directs our attention to the statute (section 3304, 2 How. Stat. [2d Ed.]; 2 Comp. Laws 1915, § 6473) which makes it a misdemeanor to have in one's possession with intent to sell any article of food which is diseased, decomposed, etc., and asks whether "it is possible that plaintiff may enforce a payment of an unfit food product in Michigan, the sale, offering for sale or having in his possession for sale here, would be in violation of the law?" If the eggs were decomposed while in defendant's possession the statute would furnish a very good reason why he should not offer them for sale to the consumer, but it would furnish no reason why he should refuse to pay for sound eggs which he contracted to pay for six months previously and to bear the loss of deterioration if any ensued. The eggs were shown to have been sound when purchased and placed in cold storage and defendant had the right of inspection, and if found otherwise than sound, to reject them. Not having done so, nothing is left for him but to bear the loss which he has expressly stipulated in writing he would assume.

3. Several questions are raised as to the admissibility of certain evidence. Inasmuch as plaintiff recovered no more than the contract price which it was entitled to recover if the jury found the eggs were sound when they were placed in cold storage these questions appear to be of no consequence.

The judgment is affirmed.

OSTRANDER, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

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COX *v.* HOLKEBOER.

1. FRAUD—RESCISSION—STATUS QUO.
   A vendee who has been defrauded in the purchase of land and desires to rescind, must act promptly and place the vendor *in statu quo*, or offer to do so.

2. SAME—VENDOR AND PURCHASER—RESCISSION.
   Where plaintiffs, claiming fraud in the sale of land to them on contract, moved off the premises, informing defendant why they had done so, offering to surrender the premises and contract, and demanding a return of the money paid, clearly indicating their intention to rescind, they did all they were required to do as a condition precedent to bringing suit; the contract being unrecorded no reconveyance was necessary.

3. SAME—RESCISSION—REFUSAL TO ACQUIESCE—STATUS QUO.
   If further acts upon the part of plaintiffs had been necessary, in order to restore the *status quo*, defendant was in no position to insist upon them, after refusing to acquiesce in the rescission and informing plaintiffs that "he would fight them to the last ditch."

4. SAME—DAMAGES.
   Plaintiffs were entitled to recover as damages the payments and taxes paid, with interest thereon, but not the rental value of the premises.

5. SAME—SPECIAL DAMAGES—PLEADING.
   Special damages not having been pleaded, no recovery could be had for loss of wages or the expenses of moving onto the premises.

6. SAME—PRINCIPAL AND AGENT—STATUTES.
   Act No. 238, Pub. Acts 1913 (3 Comp. Laws 1915, § 11981), declaring void all agreements to pay commission for the sale of real estate unless in writing, is not applicable to relieve defendant from liability for the fraudulent representations of his agent in the sale of land.

7. DAMAGES—CONDITIONAL JUDGMENT.
   Where the judgment of the court below included damages

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not authorized under the pleading, *held*, affirmed for the amount of payments, taxes and interest, conditioned upon plaintiffs' acceptance within 20 days.

Error to Ottawa; Cross, J. Submitted October 12, 1917. (Docket No. 114.) Decided March 27, 1918.

Assumpsit by Benjamin F. Cox and another against Henry Holkeboer and another for money obtained by fraud and deceit. Judgment for plaintiffs. Defendants bring error. Affirmed, conditionally.

Colin P. Campbell, for appellants.

Charles E. Misner and *Fred T. Miles*, for appellees.

BIRD, J. In April, 1915, defendant, through his agent, DeKeyzer, sold upon contract to plaintiffs a 40-acre farm in Ottawa county for the sum of $2,500. Prior to the purchase thereof plaintiffs were shown the farm by DeKeyzer. They appeared to be pleased with it and inclined to purchase, but hesitated because they were under contract to do janitor work for the Howe Military Academy until the following spring. To overcome this objection it is claimed DeKeyzer promised if they would purchase at that time he would rent the premises for them for one year for the sum of $150. This was agreed to and the deal was closed and a payment of $600 was made thereon, and later another payment followed of $300. In April, 1916, plaintiffs moved onto the premises, and, by the first of June, learned that the land was worthless, that a large part of it was blow-sand, in which no crops could be grown, and on the 21st day of June they moved off from the place, offered to surrender the contract to defendant and demanded a return of the payments made thereon, on the ground that they had been defrauded in that the soil did not measure up to the representations made to them by DeKeyzer. Defendant refused to ac-

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quiesce in the rescission, and, in reply to their demand for a return of the moneys paid him, he replied that there was "nothing doing, that he would fight them to the last ditch." Soon thereafter the plaintiffs instituted this suit and during the progress of the trial the plaintiffs tendered to defendant a quitclaim deed of the premises. Plaintiffs recovered a judgment of $1,326.40.

Defendant discusses three questions:

(1) That there was no rescission prior to the commencement of this action, or offer to rescind, which would warrant a recovery in this action upon the theory of a rescission.

(2) That the court permitted evidence of items of damage, and submitted figures to the jury as items of damage, which were erroneous upon the theory of rescission.

(3) That Mr. DeKeyzer was not the agent of the defendant so as to charge him with liability for his representations because there was no written contract with him.

1. There is no difference of opinion between counsel over the rule that a vendee who has been defrauded in the purchase of land and desires to rescind must act promptly and place the vendor *in statu quo*, or offer to do so. And counsel for defendant does not contend that what plaintiffs did toward restoring the *status quo* would not have been sufficient had it been done in season and before the suit was brought, but he insists that plaintiffs were still in possession of the premises and had tendered no reconveyance when the suit was commenced, and that a tender of a quitclaim deed upon the trial was too late to satisfy the rule. It appears from the record that plaintiffs moved off from the farm and advised defendant of the fact and why they had done so. A few days later plaintiffs offered to surrender the contract and demanded a return of the payments made thereon. Following this a

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suit was commenced by declaration and a notice of rescission accompanied the declaration. These acts clearly indicated an intention upon their part to rescind the contract. Counsel's point that the quitclaim deed was not tendered in season to be available is not well taken. The plaintiffs had no title; they had an unrecorded contract, which, if complied with, would eventually bring them the title. Where the contract is unrecorded no reconveyance is necessary. *Harding* v. *Olson*, 177 Ill. 288. When plaintiffs offered to surrender this and the possession of the premises, they did all they were required to do as a condition precedent to bringing suit. But even if further acts had been necessary in order to restore the *status quo*, defendant was in no position to insist upon them, after refusing to acquiesce in the rescission, and advising plaintiffs that "he would fight them to the last ditch." *Johnson* v. *Burnside*, 3 S. D. 230; *Ballard* v. *Lyons*, 114 Minn. 264; *Snyder* v. *Markham*, 172 Mich. 693.

2. After giving the jury some general instructions as to the measure of damages in the event they found plaintiffs entitled to recover, the trial court charged them as follows:

"If your verdict is for the plaintiffs, then they would be entitled to receive the $600 paid on the purchase price and interest from May 1, 1915, and also the sum of $314 paid on April 12, 1916, and interest, and also taxes amounting to $9.04; also freight amounting to $28.36, and a sum which would compensate him for the loss of wages during the time he stayed on the farm, together with interest at five per cent. from the time of the payments to date.

"I further charge you that if you find the promise of $150 rent made by Mr. DeKeyzer to Mr. Cox was one of the representations relied upon by the plaintiffs and was one of the inducements which led Mr. Cox to make the contract for the purchase of the farm at the time he did, then I charge you that item would be an element of damage."

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Complaint is made of this charge as not stating the proper measure of damages. We agree with the trial court that plaintiffs were entitled to recover the payments and taxes with interest thereon from the time such payments were made, but the items of loss of wages and expenses of moving from Howe to the premises were not necessarily the direct result of defendant's wrongful act, therefore, no recovery could be had on account thereof, under the declaration. Whether such damages might be recovered as special damages, we need not inquire, as the declaration was not so framed as to permit a recovery on that theory. If plaintiffs were entitled to a return of the payments, with interest, they would not be entitled, in addition thereto, to the item of $150 as rental. To allow the rental value for the first year in addition to a return of the payments and interest thereon would place plaintiffs in a better position than they would have been in had the land been as represented.

3. It is the contention of counsel that DeKeyzer could not be shown to be the agent of defendant so as to charge him with liability for his misrepresentations to plaintiffs, because there was no written contract between him and the defendant. This point is rested upon Act No. 238, Pub. Acts 1913 (3 Comp. Laws 1915, § 11981), making void every agreement, promise or contract to pay any commission, etc., unless in writing. If this were a contest between DeKeyzer and the defendant wherein DeKeyzer was seeking to recover his commissions, the statute relied upon would be in point, but inasmuch as the contest is between the defendant and the purchaser over false representations which induced the purchase of the premises, we think the statute has no application.

As the record stands plaintiffs are entitled to recover the payments, taxes and interest. In order to avoid the expense and trouble of a retrial we have

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concluded to affirm the judgment for those amounts provided plaintiffs will remit upon the record any sum in excess thereof. Defendant will recover costs in either event. In default of such reduction for 20 days the judgment will stand reversed with costs to defendant.

OSTRANDER, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

VOORHIES v. PRATT.

1. ADVERSE POSSESSION — DRAINS — RIGHT OF WAY — PERMISSIVE USER.
   A right to lay a drain and convey surface water upon the lands of another, beginning in favor, was permissive, and no rights by adverse user could arise thereunder.

2. SAME—DRAINS—RIGHT TO MAINTAIN—PRESCRIPTION.
   Where the permissive user was extinguished by sale of the premises, and thereafter defendant claimed the right to maintain the drain, and the evidence shows that he did so maintain it, going upon the premises and keeping it open, for over 16 years, *held*, a right by prescription was made out.

Appeal from Genesee; Stevens, J. Submitted October 5, 1917. (Docket No. 41.) Decided March 27, 1918.

Bill by George W. Voorhies against William Pratt and others to restrain defendants from the use of certain drains and for damages arising out of their use. From a decree dismissing the bill, plaintiff appeals. Affirmed.

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George F. MacNeal (*James S. Parker*, of counsel), for plaintiff.

H. W. Hoxie (*John H. Farley*, of counsel), for defendants.

BIRD, J. George Voorhies, the plaintiff, is the owner of 30 acres of farming land in the southwest corner of the township of Fenton, in Genesee county. Defendants' lands lie to the north and east of plaintiff's, forming a watershed of something less than 100 acres, which discharges its surface water on and across plaintiff's land to the southwest. Several months after plaintiff purchased the land in November, 1911, he discovered two tile drains discharging their waters on his land. One drain from the north was laid on his land about 12 rods and ran back onto defendants' land several rods. The other, from the east, discharged its waters at or near the line fence, and extended in an easterly direction on defendants' land 40 or 50 rods. Plaintiff was not pleased with these conditions because they made certain portions of his land wet and unproductive, and he claims that he protested to defendant Pratt and insisted upon his remedying it; that Pratt did not heed his protest and therefore he proceeded to dam the east drain at or near the line fence, but this did not avail because the water would go over the top of the dam and spread out on his field. He claims, in consequence of this drainage, his crops during the years that have followed his purchase have been damaged and that he has suffered several hundred dollars' loss. Despairing of any relief from defendants he filed this bill of complaint in October, 1914, praying for a permanent injunction restraining defendants from making use of said drains, and praying for an award of damages for the injury to his crops. Defendant Pratt and the other defendants who have recently purchased defendant's land upon con-

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tract made the defense that they had acquired a prescriptive right to maintain these drains. The chancellor found that this right existed and dismissed plaintiff's bill.

Plaintiff's proofs are convincing that something more than the ordinary flow of surface water is reaching his land through these drains and that the water is reaching his land quicker and in greater volume than it otherwise would. His testimony fairly tends to establish the fact that certain sag holes or swales on defendants' land to the east are drained or partially drained, by the east drain. His testimony also shows that his crops have been damaged by reason of this excessive drainage and we are of the opinion that he is entitled to some relief unless it can be said that defendant has acquired a right by prescription to discharge the water upon his premises in the manner indicated.

Defendants' proofs do not seriously controvert plaintiff's claims but seek to avoid the effect of them by showing that these drains were constructed in the early nineties with the consent of Mr. Hatt, who was then the owner of plaintiff's premises, under some oral agreement that when Mr. Hatt was ready to extend them through his land, defendant Pratt would assist in so doing. Defendants' testimony further shows that in March, 1898, Mr. Hatt sold the premises to James Pratt, a brother of defendant, and that he owned them until March, 1911, when they were sold by him to plaintiff; that the length of time the premises were owned by James Pratt and the plaintiff before suit was commenced was upwards of 16 years, and that the uninterrupted passage of the water through these drains during that time has given defendant a right by prescription to have them continued. The drains appear to have had their beginning in favor, extended by Mr. Hatt to defendant, and,

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therefore, were permissive. While they were maintained as a matter of favor defendant could not acquire any right by adverse user. *People* v. *Ferguson*, 119 Mich. 373. After a sale of the premises to Mr. James Pratt the favor was thereby extinguished (*Maxwell* v. *Bay City Bridge Co.*, 41 Mich. 466), and the statute would begin to run. It appears without much contradiction that during the ownership of James Pratt and plaintiff defendant Pratt went onto the premises and opened the outlets, and that during all the times since the premises were sold by Mr. Hatt defendant has claimed the right to and has maintained the drains and kept them open. The testimony does not show that at any time the use of the drains has been seriously interrupted, although it appears that plaintiff attempted to stop the flow but failed. It further appears to have been acquiesced in by James Pratt and also by plaintiff during a part of his ownership. These ownerships cover a period of over 16 years, and we think the defendants' testimony fairly made out a right by prescription. *Gregory* v. *Bush*, 64 Mich. 37; *Leidlein* v. *Meyer*, 95 Mich. 566; *Cranson* v. *Snyder*, 137 Mich. 340.

We agree with the conclusions reached by the chancellor.

The decree will be affirmed.

OSTRANDER, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

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GRAND TRAVERSE FRUIT & PRODUCE EXCHANGE *v.* THOMAS CANNING CO.

1. FRAUDS, STATUTE OF—EVIDENCE—PAROL TESTIMONY.
   Written contracts may be modified by subsequent oral agreements, if otherwise valid.

2. SAME—COMPROMISE AND SETTLEMENT—EVIDENCE.
   Testimony of a subsequent oral agreement which worked a release or discharge of the whole contract obligation was admissible, although the amount involved was more than $50.

3. SAME—EVIDENCE—FINDING BY JURY.
   Testimony, in an action for the purchase price of certain cherries, that plaintiff and defendant entered into an oral contract reducing the number of cars of cherries to be furnished under a written contract from 45 to 22½, that when 15 cars had been delivered plaintiff requested defendant to go into the open market and buy the remaining 7½ cars and charge the difference in price to it, which was done, and a bill for the difference was presented by defendant and allowed as a set-off against plaintiff's claim, *held*, sufficient to sustain a finding by the jury that the parties settled on the basis of 22½ cars.

Error to Grand Traverse; Mayne, J. Submitted October 12, 1917. (Docket No. 106.) Decided March 27, 1918.

Assumpsit by the Grand Traverse Fruit & Produce Exchange against the Thomas Canning Company for goods sold and delivered. Judgment for plaintiff. Defendant brings error. Affirmed.

Colin P. Campbell, for appellant.

Patchin & Duncan, for appellee.

BIRD, J. Plaintiff entered into a written contract with defendant in June, 1916, to deliver to it during

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the season 45 cars of sour cherries at a stated price. As the season progressed it became evident to plaintiff's manager, Mr. Kern, that the crop was not going to be as large as anticipated, and that it might have difficulty in filling the order. With this in mind Mr. Kern approached the defendant with the idea of reducing the number of cars to be delivered, and it is his claim that defendant did consent to reduce the number to 22½ cars. Plaintiff began to make deliveries, and, after delivering 15 cars to defendant, found it difficult to deliver the balance of the 22½ cars. Mr. Kern then authorized defendant to go into the open market and purchase the 7½ cars and charge to plaintiff the difference in price. Defendant did as requested, purchasing the 7½ cars and more. The price paid for the 7½ cars in excess of the contract price was $1,667. While plaintiff conceded that this sum represented the difference, he made an effort to get defendant to reduce this amount. Failing in this, the plaintiff then requested defendant to deduct the $1,667 from the amount owing for deliveries made and pay the balance. Defendant refused and this suit was begun to recover it. The trial court held, in substance, that the written contract could not be modified by the oral agreement, but permitted the case to go to the jury to determine whether there was a settlement between the parties. Judgment having passed for plaintiff, defendant insists that the trial court was in error, *first*, in admitting parol testimony modifying the written contract; *second*, in submitting the question of settlement to the jury.

1. Was the court in error in admitting parol testimony of the subsequent agreement? Had the testimony related to a prior or contemporaneous agreement it is apparent that its admission would have been error under the well settled rule of evidence. The claimed agreement was, however, a subsequent

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agreement and it is generally held that written contracts may be modified by subsequent oral agreements if otherwise valid. *DeCamp* v. *Scofield,* 75 Mich. 449; *Liggett Spring & Axle Co.* v. *Michigan Buggy Co.,* 106 Mich. 445; *Wolff* v. *Alpena National Bank,* 131 Mich. 634; *Town* v. *Jepson,* 133 Mich. 673; *Katz* v. *Bedford,* 77 Cal. 319; *Barber* v. *Brace,* 3 Conn. 9; *Spann* v. *Baltzell,* 1 Fla. 301; *Richardson* v. *Eveland,* 126 Ill. 37; *Welz* v. *Rhodius,* 87 Ind. 1; *Illinois Cent. R. Co.* v. *Manion,* 113 Ky. 7; *Palmer* v. *Fogg,* 35 Me. 368; *Baltimore Pearl Hominy Co.* v. *Linthicum,* 112 Md. 27; *Conrad* v. *Fisher,* 37 Mo. App. 352; *Harris* v. *Murphy,* 119 N. C. 34; *LeFevre* v. *LeFevre,* 4 Serg. & R. (Pa.) 241; *McCauley* v. *Keller,* 130 Pa. St. 53; *Putnam Foundry & Machine Co.* v. *Canfield,* 25 R. I. 548; *Bryan* v. *Hunt,* 4 Sneed (Tenn.), 543; *Bannon* v. *Aultman & Co.,* 80 Wis. 307.

But counsel says that this rule does not apply in the instant case because the statute of frauds makes void contracts of this character involving more than $50 unless in writing. Upon this question the courts are divided. Some of them hold that parol testimony is admissible even where the subsequent agreement is within the statute, but the weight of authority denies this right and this court early in its history ranged itself with the latter, holding that testimony of such agreements is inadmissible. *Abell* v. *Munson,* 18 Mich. 306; *Cook* v. *Bell,* 18 Mich. 387. See, also, 10 R. C. L. 1035, and cases cited. But even those courts which hold to this view permit testimony of subsequent oral agreements which work a release or discharge of the whole contract or obligation. See note to *Abell* v. *Munson,* 100 Am. Dec. 172, citing cases.

The trial court obviously took the view of these cases and submitted the question to the jury whether the minds of the parties met on the sum which should be in discharge of their contract obligations. We are

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inclined to agree with the trial court that this rule should be applied. This brings us to counsel's second proposition, that there was no testimony of such a settlement. Although the testimony was somewhat meager we think there was testimony submitted to the jury from which an inference might be drawn that the minds of the parties met on the sum of $1,667 as the sum which would put an end to their contract relations. Plaintiff's testimony, although contradicted in part, shows that he agreed with defendant's agent that the number of cars to be delivered should be reduced from 45 to 22½; that when 15 cars were delivered he asked defendant to go into the open market and buy the remaining 7½ cars and charge the difference in price to it. Defendant did so and after doing so presented to plaintiff a bill of $1,667 which the cherries had cost more than they would have cost had plaintiff delivered them at the contract price. This was presented as a set-off against plaintiff's claim. Plaintiff recognized this as the sum for which it was liable by reason of its failure to deliver the 7½ cars, but Mr. Kern, thinking the loss was large, appealed to the generosity of defendant to reduce it. This testimony, together with some other items of proof showing acts done by defendant in recognition of the subsequent agreement, is persuasive that the parties at that time understood they were dealing and settling on a basis of 22½ cars. There was sufficient testimony along this line to furnish a basis for the finding of the jury.

The judgment is affirmed.

OSTRANDER, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

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AULL v. PETERSON.

1. CANCELLATION OF INSTRUMENTS—CONTRACTS—INSANE PERSONS —COMPETENCY.

   In proceedings in the court of equity by the guardians of a man over 75 years of age, suffering with *senile dementia*, to set aside a contract made by him with defendants for his board and lodging for the rest of his natural life, on the ground of his mental incompetency at the time the contract was made, evidence examined, and *held*, sufficient to sustain the finding of mental incompetency.

2. EQUITY—INCOMPETENT PERSONS—BOARD AND KEEP—AMOUNT OF COMPENSATION.

   An allowance of $12 per week for the board and lodging of an incompetent person, and $68 for other services rendered him during a period of 68 weeks, under conditions which were somewhat trying because of his mental condition and filthy habits, *held*, not excessive.

Appeal from Allegan; Cross, J. Submitted October 19, 1917. (Docket No. 17.) Decided March 27, 1918.

Bill by Adolphus Aull and another, guardians of Henry Aull, an incompetent, against Mary E. Peterson and another for the cancellation of a contract and for an accounting. From the decree rendered, both parties appeal. Affirmed.

Clare E. Hoffman, for plaintiffs.

Smedley & Linsey, for defendants.

BIRD, J. The bill in this case was filed to cancel the following contract:

"FENNVILLE, MICHIGAN, December 15, 1913.

"I, the first party, Henry Aull does agree to turn over notes to the second party, Mrs. M. E. Peterson, amount twenty-one hundred and nineteen dollars, and pension of $20.00 per month and what arise I get. With six thousand dollars at my death

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"I, the second party, Mrs. M. E. Peterson does agree to give the first party, Henry Aull, board and lodging and good care the natural life time of the first party, Henry Aull.

"I, the first party, Henry Aull, does agree to turn over notes of twenty-one hundred and nineteen dollars at the time first and second party signs this contract.

"I, the first and second party, Henry Aull and Mrs. M. E. Peterson, does agree this shall be deposited in the Old State Bank of Fennville or at Fruit Growers Bank at Saugatuck. I, the first and second party, Henry Aull and Mrs. M. E. Peterson, does agree that this contract is a permanent agreement between first and second party, Henry Aull and Mrs. M. E. Peterson.

"HENRY AULL,
"MRS. M. E. PETERSON.

"Witnesses:
"CHESTER T. PETERSON,
"MRS. LENA PETERSON."

Henry Aull at the time this contract was made was a bachelor, 75 years of age. He was a farmer in his early life and was an old time resident of Allegan county, and had, by careful management of his business affairs, accumulated a fortune estimated at $50,000. For at least 20 years he had been retired from active farming and had boarded with a Mrs. McCormick at Fennville, a neighbor of defendants. At about the time the contract was made, for some reason it became inconvenient for him to remain longer at Mrs. McCormick's and he applied to Mrs. Peterson to provide a home for him. Mrs. Peterson permitted him to come to her home, and on the following day this contract was made. He remained there for a period of 68 weeks, when he left and returned to the home of Mrs. McCormick. His brother, Adolphus, learning of his mental condition, came to see him and took him to his home in St. Clair county, in the State of Illinois, where he was adjudged incompetent by the

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proper authorities, and Adolphus and Jacob, brother and nephew, were appointed guardians of his person and estate. It is their claim in the bill that Henry was mentally incompetent at the time he entered into this contract. After a somewhat extended hearing the chancellor found that Henry Aull was mentally incompetent at the date of the contract, and made a decree canceling it, and awarding Mrs. Peterson $12 a week for board and care during the 68 weeks he remained with her. He awarded defendant Chester Peterson, a son of Mary, for services in shaving Henry and in driving him around the country, the sum of $68, and decreed that defendants should return to plaintiffs the sum of $1,837.37. From this decree both parties have appealed.

Plaintiffs assert that the chancellor was wrong in awarding Mrs. Peterson $12 per week for the care of Mr. Aull, inasmuch as the proofs show that he was boarded and cared for at Mrs. McCormick's prior to his going to Mrs. Peterson's for $3.50 a week, and after he returned for $4 a week; that the award of $68 made to Chester Peterson was too large for the services which he performed, and that the testimony in that regard does not support the finding.

Defendants claim that the decree is wrong because it determines that Henry Aull was mentally incompetent at the time the contract was made.

Several physicians were sworn and testified that Henry Aull was afflicted with *senile dementia* and was at that time in a well advanced stage. They testified that *senile dementia* was a progressive disease due to old age, and that the progress of the disease depended upon the condition of the particular patient. Testimony was given by them to the effect that when questioned by them he could not recall his surname. Did not know how old he was; could not tell where his home was, and did not appear to know that he

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had any business interests; could not tell whether he was in Chicago or Kalamazoo, and could not tell who was President of the United States. One physician testified that when he was brought to his office in Chicago for examination he tried to make love to a nurse in his employ and that later when his wife came in he attempted to make love to her. The physicians gave it as their opinion that he was not mentally competent to transact business in December, 1913, at the date of the contract, although the examinations were made some time subsequent to that date.

It was shown by the testimony of the defendant Mary Peterson, that while he was at her house he refused to bathe, that he did not take a bath during all the time he was there; that he would lie upon the floor and break wind in the presence of the family; that he would not attend the calls of nature, and as a consequence his clothing became filthy and offensive, due to being saturated with urine; that he was affected with catarrh and would sit at the table and permit the mucus from his nose to fall onto his plate and food without making any effort to prevent it.

As is usual in such cases many neighbors, business acquaintances and friends were sworn, and nearly all of them had observed more or less change in Mr. Aull since 1911 or 1912, but they were divided in opinion as to whether he was mentally competent to transact business and protect himself at the time the contract was made. The testimony shows that after this change came over him he was unsteady of gait, looked feeble and was rambling in his conversation, and that it worked a complete change in his habits of life. That instead of being a prudent business man he became careless and loaned money without security. Instead of being clean and tidy he took no care of his person, and refused to bathe. Instead of having good table manners he ate with his hands and crowded the

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food into his mouth, and indulged in other disgusting habits which were offensive. Instead of being a spare eater he became a ravenous one. Instead of continuing his lifelong aversion for women he wanted to caress and make love to nearly every woman he met. The doctors explained that his unsteady gait and this reversal of habits was quite characteristic of the disease from which he was suffering.

The testimony taken in its entirety is very convincing that Henry Aull's mind was very much impaired at the time he entered into the agreement and it is probable that no one knew this better than Mrs. Peterson, because she knew him and could compare him in his then mental condition with his former self. Notwithstanding this knowledge she manifested a disposition to take advantage of his weakness by demanding not only compensation but a bonus, at the same time giving him no assurance or security that the contract would be carried out in the event of her illness or death. The following excerpts from her own testimony will indicate the state of her mind while dealing with him:

"*Q.* He was not very contrary about making a contract with you, was he?

"*A.* It was his own doings, I did not want him to make any contract. I did not ask for anything. I told him I would not take him to keep him his lifetime unless he would make it an object for me to take him. He had to raise the pile enough so that it became an object to me, and that is what he did do.

* * *

"*Q.* How was he in his conduct with you, did he try to get familiar with you?

"*A.* No, he did not get familiar, to make love, he asked me to marry him, that was all. He asked me to marry him, I think it was in the fall that he went away in the spring. He went away in the spring and I told him if I should marry him he would have to give me a certain amount for my own share, and he proposed to say—he said he would not do it, and

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so I said all right. Then he wanted to let it stand until spring, then in the spring he said he guessed he would let it drop, and I thought so too."

Upon the whole record we are persuaded that the chancellor reached the right conclusion on the question of mental competency. We also agree with him that $12 per week for Mr. Aull's board and care is not too much if the conditions existed which Mrs. Peterson and others detailed. Neither are we prepared to say that $68 allowed to Chester for services which he rendered Mr. Aull is excessive. The conditions under which some of the services were performed were somewhat trying and we think this allowance should not be disturbed.

We think the decree a very just solution of the whole matter and it will be affirmed. No costs will be allowed either party.

OSTRANDER, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

STATE SECURITY & REALTY CO. *v.* BADGER.

1. TRIAL—FRAUD—CONFLICTING EVIDENCE—QUESTION FOR JURY—JUDGMENT NON OBSTANTE VEREDICTO.

   In an action for fraud in the sale of lots, where the evidence was conflicting, the issue was properly for the jury, and the court below was in error in entering judgment *non obstante veredicto.*

2. FRAUD—SALES—MATERIAL STATEMENT OF FACT.

   In an action for fraud in the sale of lots, a statement by

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the vendor that the "improvements had all been paid for except the paving" was a material statement of fact, which, if relied upon by plaintiff and untrue, entitled it to a verdict.

3. SAME—EVIDENCE—WEIGHT OF EVIDENCE.
Where the representation of fraud relied upon by plaintiff was testified to by its president, the president's son, and the broker who made the sale, and was denied by defendant only, a verdict for plaintiff cannot be said to be against the weight of the evidence.

4. TRIAL—FRAUD—PROOFS—INSTRUCTIONS.
Where there was sufficient evidence of fraud to carry the question to the jury, an instruction by the court that the fraud should be established by clear proof, and that if there was such proof in this case that satisfied them that plaintiff was defrauded in the manner alleged, the plaintiff should be given a verdict, but if not so satisfied the defendant would be entitled to a verdict, *held*, as favorable to defendant as he was entitled to.

5. AMENDMENTS—PLEADING—VARIANCE—GIST OF ACTION.
Where the declaration alleged that the fraudulent representations relied upon were made at the lots, while the proofs disclosed that they were made in plaintiff's office, plaintiff's motion to amend the declaration to correspond with the proofs should have been allowed; the variance being unimportant to the gist of the fraud.

Error to Wayne; Mandell, J. Submitted October 18, 1917. (Docket No. 89.) Decided March 27, 1918.

Assumpsit by the State Security & Realty Company against Albert E. Badger for money obtained by fraud and deceit. Judgment *non obstante veredicto* for defendant. Plaintiff brings error. Reversed, and judgment entered on the verdict.

Wilkinson, Routier & Hinkley, for appellant.

John C. Shields, for appellee.

BIRD, J. Through the efforts of William J. Stanfield, a real estate broker, defendant sold to plaintiff

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on land contract five lots on Pennsylvania avenue in the city of Detroit. Subsequently the abstracts were examined by plaintiff's counsel, and, being found satisfactory, warranty deeds were made and delivered to plaintiff on the 30th day of December, 1911. On February 25, 1913, plaintiff learned that the city of Detroit had certain charges against the lots for the construction of sidewalks adjacent thereto, which had become liens thereon since they were purchased by it. Plaintiff paid the assessments and demanded reimbursement from defendant. Defendant declined to make payment on the ground that the charges were not liens at the time the conveyances were made. Plaintiff, to enforce his demand, commenced this action. The declaration charged that plaintiff was induced to enter into said contract by reason of defendant's false and fraudulent representations "that the improvements were all in and paid for except the paving," and that it relied upon said representations when in truth and in fact they were false. Defendant denied having made these representations, or any representations save those contained in the contract. The issue as to whether the representations were made was submitted to the jury and they found for the plaintiff in the sum of $799.74, the same being the amount of the assessments plus the interest. The trial court, having reserved the right under the statute to control the verdict, subsequently, and upon motion, entered a verdict for the defendant on the ground that the testimony was not sufficient to raise an issue of fact as to the fraud charged. The principal question raised is whether the court was in error in so doing.

1. Plaintiff, in support of its charge of fraud in the declaration, offered the testimony of Mr. Franklin Bushman, its president, who testified that:

"Mr. Badger made the same representations that the lots laid so and so, and he showed them to us on

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the plat, and that they had all the improvements except the pavement paid for, free and clear of any incumbrance."

Mr. Frank Bushman, the son, was present in plaintiff's office when the talk was had. He testified that:

"He (defendant) stated that these lots—that they were—he said they had all the improvements in and they were paid for except the paving."

Mr. Stanfield, the broker who negotiated the deal, admitted that he made such representations on behalf of his principal to Mr. Bushman and afterward was present when the defendant made like representations to Mr. Bushman.

Mr. Badger, the defendant, denied that he made such representations. This, therefore, raised a question of veracity between the Bushmans and Stanfield on the one hand, and Badger on the other. This issue was one of fact and the trial court submitted it to the jury, instructing them, in substance, that if they believed the testimony of plaintiff they should give it a verdict for the amount of the assessment plus the interest; that if they believed the defendant's version then they should render a verdict of no cause of action.

We think the trial court was right in submitting the issue to the jury, but we think he was in error in subsequently directing a verdict for defendant. The statement that the "improvements had all been paid for except the paving" was a material statement of fact and if plaintiff relied upon the statement in making the purchase and it was untrue, it was entitled to the verdict which the jury returned. We are also of the opinion that the verdict was not against the weight of the evidence, if plaintiff's version is to be accepted, as it evidently was by the jury.

2. Some discussion is indulged in in the briefs concerning the *quantum* of evidence necessary to make an issue of fact in a case where fraud is alleged. We

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see no occasion to discuss this question as the issue was clean-cut, and the testimony was sufficient to carry it to the jury. Either the defendant Badger did or did not make the misrepresentations, and whether he did was a question of fact for the jury and not for the court. The trial court did instruct the jury that:

"Where fraud is used as a basis of an action, the fraud should be established by clear proof before a verdict is returned against one charged with such fraud, and if there is such proof in this case that satisfies you that plaintiff was defrauded in the manner alleged in the declaration, then give the plaintiff a verdict for the sum of $799.74. If you are not so satisfied, the defendant would be entitled to a verdict of no cause for action."

This was fully as favorable to defendant as he was entitled to have given. See *Sweeney* v. *Devens*, 72 Mich. 301; *Walsh* v. *Taitt*, 142 Mich. 127.

3. The point was made on the trial by the defendant that there was a fatal variance between the pleadings and proofs. In the declaration it was alleged that the defendant "took plaintiff's president, Mr. Bushman, to the lots and pointed out the fact that the sidewalks were laid, and stated to him that said sidewalks were laid and paid for." The proofs disclosed that at the time the statements were made the defendant, Mr. Badger, was at Mr. Bushman's office and not at the lots. After the variance was called to the attention of the court plaintiff asked permission to amend the declaration to make it correspond with the proofs. This application was denied. We think it should have been allowed. Sec. 6, chap. 16, Act No. 314, Pub. Acts 1915 (3 Comp. Laws 1915, § 12483); *Charlet* v. *Teakle*, 197 Mich. 426.

The gist of the fraud was the statement that the "improvements were all paid for except the paving." That was the statement defendant came to the trial

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to combat, and the fact that defendant was one place rather than another at the time he made the representations was not very important.

The judgment entered by the court must be set aside and one entered upon the verdict of the jury, with costs of this court to plaintiff.

OSTRANDER, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

ALBERT A. ALBRECHT CO. *v.* WHITEHEAD & KALES IRON WORKS.

1. MASTER AND SERVANT—NEGLIGENCE OF THIRD PARTY—PERSONAL INJURIES—REMEDY.

   An employee, injured through the negligence of a third party, may pursue his common law remedy against said third party or demand compensation from his employer under the provisions of the workmen's compensation law. Section 15, part 3, Act No. 10, Extra Session 1912 (2 Comp. Laws 1915, § 5468).

2. SAME—ELECTION OF REMEDIES — WAIVER — EXTINGUISHMENT—ASSIGNMENTS.

   The election of the injured employee to take under the workmen's compensation law rather than pursue his remedy against said third party, amounted to a waiver extinguishing his common law remedy, and an assignment of it to the employer would not furnish the basis for a suit to recover compensation paid by him to the employee under said act.

3. SAME—WORKMEN'S COMPENSATION LAW—LIABILITY OF THIRD PARTY—CONSTRUCTION—INTENT.

   In an action by an employer to enforce the liability of a third party for compensation paid by the employer to an injured employee under the provisions of the workmen's compensation law, section 15, part 3, of said act creating said liability construed, and *held*, to be the intent that the employer may enforce the liability of such other person to the extent that he has paid compensation to the injured party, and no farther.

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Error to Wayne; Collingwood, J., presiding. Submitted October 22, 1917. (Docket No. 70.) Decided March 27, 1918.

Case by Albert A. Albrecht & Company against the Whitehead & Kales Iron Works to recover damages paid under the workmen's compensation act to an employee injured by reason of defendant's negligence. Judgment for plaintiff. Defendant brings error. Affirmed, conditionally.

Goodenough & Long (*Albert M. Kales*, of counsel), for appellant.

Keena, Lightner, Oxtoby & Hanley, for appellee.

BIRD, J. Both parties to this suit are building contractors and both assisted in the construction of the Morgan & Wright building in Detroit in the year 1913. Plaintiff had the contract to construct the masonry, and defendant had the contract to erect the structural steel. During the progress of the work one John Debinski, a servant of plaintiff, was injured by what is claimed to have been negligent acts of defendant's servants. Debinski demanded compensation of plaintiff, who was subject to the provisions of the workmen's compensation act, and was paid a total of $1,408.33 up to the commencement of this suit. This sum was increased to $2,215 at the time of trial. Plaintiff was permitted by the trial court to recover the sum which Debinski would have been permitted to recover had he elected to pursue his common law remedy. The jury returned a verdict for plaintiff of $10,000. Defendant contends that a recovery on this basis was wrong; that the recovery should have been limited to the sum paid to Debinski in discharge of plaintiff's obligations imposed by the compensation act. In other words, that the question is one of indemnity only.

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1. A solution of this question depends upon the construction to be given to section 15, part 3, of the compensation law (Act No. 10, Extra Session 1912, 2 Comp. Laws 1915, § 5468):

"Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages, or against the employer for compensation under this act, but not against both, and if compensation be paid under this act the employer may enforce for his benefit or for that of the insurance company carrying such risk, or the commissioner of insurance, as the case may be, the liability of such other person."

After Debinski was injured he had his choice of two remedies. He could pursue his common law remedy against the company, whose negligent acts caused his injuries, or he could demand compensation from his employer through the industrial accident board. He chose the latter and received an award of $10 per week for 400 weeks. This election by him under the terms of the act would amount to a waiver upon his part of his common law remedy (section 15, *supra*). The common law action having been extinguished by Debinski's election, an assignment of it could not furnish a basis for this suit, and we do not understand it is now so claimed, although one count of the declaration counted upon an assignment of the cause of action. We, therefore, conclude that the basis for this suit must be found in the act itself, if at all. The latter part of the section provides that:

"If compensation be paid under this act the employer may enforce for his benefit, or for that of the insurance company for carrying such risk, or the commissioner of insurance, as the case may be, *the liability of such other person.*"

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This clearly authorizes the present suit by the employer. It, in express terms, gives him the right to recover, but how much may he recover? Plaintiff answers: The sum that Debinski could have recovered had he elected to bring the action himself. Defendant answers: The sum plaintiff has been obliged to pay by reason of the action of the compensation board. The question, therefore, must finally turn on the construction of the last six words of the section heretofore quoted. Considering the language used we think it indicates that the legislature intended to provide for indemnity only. It says to the employer in substance: "If you have paid compensation you may recover from the party in fault." The inference is very persuasive that it was intended that the employer's recovery should be measured by the amount of compensation paid, and it is still more persuasive when we consider that the cardinal purpose of the act was compensation and not speculation. To hold that the employer might recover the same amount the injured party might have recovered would permit the employer to speculate on the misfortunes of his employees. But counsel reply to this that a trust should be impressed on the excess recovered in favor of the injured party. If this were so, would not the injured party then have two remedies when the statute says he shall have but one? If the injured party is willing to waive the excess by accepting the more certain award of the compensation board, why should the act permit a disinterested person to recover it? We are persuaded that the language should be construed to mean that the employer may enforce the liability of such other person to the extent that he has paid compensation to the injured party, and no farther. This construction is not only consistent with the letter of the law but is in accord with the spirit of it.

This view is strengthened by the holding in *Grand*

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Rapids Lumber Co. v. *Blair,* 190 Mich. 518. This question was not therein directly involved but this section of the law was being considered. It was there said:

"This case involves a relation of indemnitee and indemnitor in which a liability over is placed upon the original tort-feasor whose negligence caused the injury, a relation which may be created by contract or legislation for protection of the party, who, though not actively guilty of the tort, may, by law, be liable therefor to the injured party."

2. If the question be one of indemnity the further question is raised, when may the amount allowed by the compensation board be recovered by the employer? We think a cause of action would accrue to the employer whenever he has made a payment in pursuance of the order of the commission (22 Cyc. p. 98), and this would be true whether the payment was a weekly payment or of the entire award. Any other rule would likely result in more or less confusion by reason of the right of the commission to revoke its orders, to reduce the number and amount of payments and to discontinue them altogether. In accordance with request of counsel, the case may be remanded to the trial court where the amount paid by plaintiff will be ascertained, and when ascertained a judgment for that amount will be affirmed. The subsequent payments may be sued for and recovered as they become due and payable under the orders of the industrial accident board. In default of the amount being ascertained and entry of judgment thereon within thirty days from the date of filing this opinion, the judgment of the trial court will be reversed and a new trial ordered, with costs to the defendant in either event.

OSTRANDER, C. J., and MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

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EDISON ILLUMINATING CO. *v.* MISCH.

1. HIGHWAYS AND STREETS—ALLEYS—USE BY PUBLIC SERVICE CORPORATION—MUNICIPAL CORPORATIONS.
   Under section 28, art. 8, Const. 1909, the right is reserved to all cities, villages and townships to the reasonable control of their streets, alleys, and public places.

2. SAME — MUNICIPAL CORPORATIONS — TITLE TO STREET — PUBLIC PURPOSES.
   The title of a municipality in streets and alleys is such as to enable the public authorities to devote them to public purposes.

3. SAME—RIGHTS OF ABUTTING OWNER—REVERTER—FEE.
   While the abutting owner of a public alley has the right of ingress and egress to and from his lot, and a possibility of reverter, the fee is in the municipality in trust for the public. Section 3351, 1 Comp. Laws 1915.

4. SAME—USE OF STREET—PUBLIC PURPOSES.
   A street or alley is not for the purposes of passage and travel merely, but for all the uses to which they are usually devoted, as the wants or conveniences of the public may render necessary or important.

5. SAME—PUBLIC SERVICE CORPORATIONS—RIGHTS IN ALLEY.
   A contractor who, in excavating for the erection of a building on a lot abutting on a public alley, excavates into the alley and damages the mains and conduits of a public service corporation, placed therein under its franchise granted by a city ordinance, does so at his peril; its rights in said occupancy being entitled to protection by him.

6. SAME—NOTICE—EVIDENCE—QUESTION FOR JURY.
   Evidence of the existence of manholes in the alley in the vicinity of the excavation belonging to plaintiff and other corporations, indicating the existence of the underground structures, *held*, sufficient at least to warrant the submission to the jury of the question of sufficiency to put defendant upon notice of their presence.

7. SAME—MUNICIPAL CORPORATIONS—WAIVER—DEFENSES.
   While a city might waive a provision in the franchise of a public service corporation, placed therein for the protection of the city, requiring it to obtain a permit from

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the proper city authorities before placing its mains or conduits in a public street or alley, the failure of the corporation to obtain such permit is no defense to an action by it for damages to them by a private contractor while excavating in an alley preparatory to erecting a building.

8. SAME—EASEMENTS—PUBLIC SERVICE CORPORATIONS—FRANCHISE. The right of a public service corporation, under its franchise, to lay mains and conduits in a public alley, constituted a continuing easement with which defendant had no right to interfere.

9. APPEAL AND ERROR—HARMLESS ERROR—REVIEW. Assignments of error relating to the introduction of evidence, which, even if inadmissible, was harmless, will not be reviewed by the Supreme Court.

Case-made from Wayne; Van Zile, J. Submitted October 8, 1917. (Docket No. 55.) Decided March 27, 1918.

Case by the Edison Illuminating Company against Otto Misch for damages to its mains and conduits. Judgment for plaintiff. Defendant appeals. Affirmed.

Charles R. Robertson, for appellant.

Oxtoby & Wilkinson, for appellee.

STONE, J. This case was brought here by the defendant upon a case-made after judgment. It is an action on the case by the plaintiff, in its own right, and as assignee of the Central Heating Company, public service corporations, operating in the city of Detroit, against the defendant to recover damages for injuries to the underground conduits and cables of the plaintiff, and a steam heating main of the Central Heating Company, caused by a cave-in on the night of June 11, 1913, of an excavation made by defendant, extending out into an alley in the rear of premises known as No. 5 Center street. Said premises belonged to C. H. Werner & Sons, and extended from

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said street to the alley in the rear. Desiring to erect a building thereon, said owners, in March, 1913, made a contract with M. E. Ryan & Son for excavating the basement; and said contract had been completed and was of a depth of about 9 feet and extended to the alley in the rear. On May 16, 1913, the owners made a contract with the defendant for the mason work. The main excavation by Ryan & Son had been completed about 30 days before defendant entered upon the premises to perform his contract. In order to put the footings under the rear wall, defendant, some days prior to June 11, 1913, extended the excavation out into the alley and beyond the lot line for a distance of about 18 inches covering the entire width of the proposed structure, and carried the excavation down an additional 5 feet, making the rear wall of the excavation, a wall of earth about 14 feet in height and extending the entire width of the proposed building. On or about June 11, 1913, the alley wall of clay caved in, carrying with it the mains of the Central Heating Company and the conduits of the Edison Illuminating Company.

Plaintiff had, for a period of about six years prior to June 11, 1913, maintained conduits in this alley, for the purpose of carrying electric wires used in its business of generating and distributing electric current within the city, under a franchise granted to it by a city ordinance approved July 13, 1886, being chapter 258, Compiled Ordinances 1912, and ordinances amendatory thereof. Before excavating in the alley for the purpose of installing its conduits, plaintiff had obtained a permit from the department of public works.

Plaintiff's assignor, the Central Heating Company, had for a considerable time prior to June 11, 1913, constructed and maintained beneath the surface of this alley, a heating main for use in its business of gen-

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erating and distributing steam for heating purposes, under a franchise granted to it by an ordinance of the city, approved August 5, 1903, being chapter 265 of the Compiled Ordinances of 1912. Section 4 of the said ordinance contained the following provision:

"The said company shall, in laying its mains, occupy such parts of the streets, alleys, avenues or public places as the commissioner of public works of the city shall designate in writing, which designation shall be made without unnecessary delay, and within ten days after request in writing so to do."

Preliminary to making the necessary excavation in the alley to lay the steam main in question, the Central Heating Company had not obtained from the department of public works, any permit, running to itself by name. There was, however, produced from its files, and introduced in evidence, upon the trial, over the objection of the defendant, a permit issued by the department of public works to the Murphy Heating Company, authorizing the making of an excavation in this alley for the laying of the steam main in question. There were also introduced in evidence bills rendered by the city of Detroit to, and paid by, the Central Heating Company, for the fees of the city for inspecting the pavement of the alley, and the work of relaying it, after its steam main had been laid, and the excavation filled up. For the purpose of showing that the permit produced from the files of the Central Heating Company was made out in the name of the Murphy Heating Company by a clerical error on the part of the clerk in the department of public works who issued the permit, the franchise of the Murphy Heating Company was received in evidence, over the objection of defendant; which franchise showed that the Murphy Heating Company had no franchise to lay any steam pipes in that part of the city in which the alley in question is located.

While there were no writings, memoranda or draw-

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ings on file in the office of the board of public works which showed the exact location of plaintiff's conduits, or of the steam main of plaintiff's assignor, the record shows that about 60 feet from the excavation there was a manhole of the Edison Illuminating Company, upon the iron cover of which, the date "1906," was cast, showing the time that the manhole had been constructed; that at either end of the alley were manholes of the Central Heating Company, and at the north end of the alley, beyond the property line, and within the sidewalk line, was a manhole of the Detroit Telephone Company; that 29 and 36 feet, respectively, north of the excavation was a Home Telephone manhole, and a public lighting commission manhole, and south of the excavation, and in the center of the alley, was a manhole of the public sewer. On cross-examination it was shown that the said covering to the manhole was laid in the alley pavement, and subject to being covered up by any dirt or litter that might be in said alley. Plaintiff claimed that all of these objects amounted to physical evidence of the existence of underground structures beneath the pavement of the alley, of which defendant was bound to take notice. On the other hand, defendant claimed that it was the duty of plaintiff and its assignor to comply with all the requirements of the charter, and to see that permits were properly granted; and that it was their duty to see that proper records were made, if they desired the advantage of any notice to the public.

It appeared that in laying the mains and conduits a trench was dug about five feet deep and two feet wide, which was partially filled with crushed stone, so as to allow the water to seep away; the steam mains were laid on the crushed stone, also crushed stone put about them, and the whole covered with earth; the tile conduits were placed above the steam mains and below the iron tube.

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Defendant, before carrying his excavation out into the alley, did not make any inquiry of plaintiff, or its assignor, as to whether they owned and maintained any structures beneath the surface of the alley. Defendant offered to show that no notice was served, either by plaintiff, or its assignor, upon the defendant advising him of the existence, beneath the surface of the alley, of the mains and conduits in question, of the existence of which he was ignorant; which offer was overruled by the court, and defendant excepted to such ruling.

Plaintiff and its assignor expended the sum of $395.69 to repair the damages to their conduits and mains caused by the alley caving in on June 11th.

Practically the only disputed question of fact presented by the testimony, was whether or not defendant had used reasonable care in shoring or bracing up the alley wall, to prevent the caving in of the soil of the alley. The testimony of an inspector in the employ of the police department of the city was to the effect that several previous warnings had been given defendant's employees, that the alley wall of earth was in a dangerous condition, and that it had not been shored or braced up, as late as 4 o'clock in the afternoon of June 11th.

The defendant offered testimony of a number of men who were engaged in the work of making the excavation, tending to show that in compliance with instructions and suggestions given by the inspectors from the police department, the rear wall of this excavation had been shored up with planks and timbers. This question was submitted to the jury by the trial court. The trial resulted in a verdict and judgment for the plaintiff in the sum of $444.05 damages, and costs of suit.

By his assignments of error, and in his brief, counsel for defendant claims:

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1. That as a contractor with the owners in fee of the lot where the excavation was made, defendant was a licensee, and entitled to all the rights of the owners of the fee in the premises, and that the fee extended to the center of the alley.

2. That it was the duty of the Central Heating Company and the Edison Illuminating Company, to fully comply with all the terms and conditions of the franchises under which they operated, that is, to obtain proper permits, and file the necessary memoranda of drawings with the department of public works. That the purpose of the conditions of the franchises was, that the public and the property owners might have notice of where steam mains and electrical conduits were laid.

3. That by reason of having dug a trench and filled it with crushed stone to permit the water to seep through, the nature of the soil was changed, and plaintiff and its assignor were not entitled to lateral support from the defendant, or his licensor.

4. That the court erred in permitting plaintiff to introduce in evidence the franchise of the Murphy Heating Company.

5. That the court erred in permitting plaintiff to show that defendant had not notified it of his intention to excavate into the alley.

6. That the court erred in refusing to permit defendant to show that he had received no notice from plaintiff or its assignor, of the existence of their steam mains and conduits in the alley.

1. It is urged by appellant that the alley is a part of the adjacent lot which belonged to Werner & Sons, whose title extended to the center of the alley; that the alley was set aside for the use, accommodation and benefit of the owners of the property abutting thereon, subject to certain limited rights therein for municipal purposes, and the grievance, if any, arising from the wrongful use of the alley is one accruing to the other abutting property owners; that it was not a wrongful use of the alley to shear off eighteen inches; that it was a matter of convenience to the defendant who was a licensee of the title holder; that the act

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was no injury to abutting property owners, and that the plaintiff and its assignor were not such owners, and had merely a naked right to place and keep their pipes and conduits somewhere in the alley. On the other hand, the plaintiff claims that it is immaterial who defendant was, whether contractor, abutting property owner, or a third party; that even an abutting property owner has no right to excavate into an alley and damage property rightfully therein, whether public utility conduits, mains, city pavements, sewers or other structures; and that the damage here complained of did not arise from a wrongful use of the alley, but rather from its partial destruction by the defendant.

In *Paul* v. *City of Detroit*, 32 Mich. 108, Justice CAMPBELL said:

"An alley is no more than a way subject to a modified supervision, and liable to be used for drainage and other urban services, under municipal regulation."

See 2 C. J. p. 1151, title "Alley."

While alleys are not referred to in either the Constitution of 1835 or 1850, they are specifically referred to in our present Constitution and the right of public utilities to use alleys as well as streets, with proper municipal consent, is expressly recognized. The last clause of section 28 of article 8 reads as follows:

"The right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships."

The present statute relating to town plats (chapter 74, 1 Comp. Laws 1915, § 3351) vests the fee of streets and alleys in the city or village within the corporate limits of which the land platted is included, or, if not included within the limits of any incorporated village or city, then in the township within the limits of which it is included, in *trust* to and for the uses

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and purposes therein designated. The former statute vested the fee of streets and alleys in the county.

It has been held by this court that whatever the nature of the title of the municipality in streets and alleys (whether a fee simple or only a conditional fee, or a perpetual easement), it is such as to enable the public authorities to devote them to public purposes. *County of Wayne* v. *Miller,* 31 Mich. 447.

Upon the vacation of a street or alley the title reverts to the abutting owners (section 3355, 1 Comp. Laws 1915); *Scudder* v. *City of Detroit,* 117 Mich. 77; *Michigan Cent. R. Co.* v. *Miller,* 172 Mich. 201

We are dealing here with an existing public alley. Before the vacating of an alley, what the interest of the abutting owner may be, whether more than that of a possibility of reverter, we need not decide. He has the right of ingress and egress to and from his lot. Manifestly, the fee is in the municipality in trust for the public. *Bay County* v. *Bradley,* 39 Mich. 166.

The dedication must be understood as made and accepted with the expectation that the street or alley may be required for other purposes than those of passage and travel merely, and that under the direction and control of the public authorities it is subject to be appropriated to all the uses to which city streets or alleys are usually devoted, as the wants or conveniences of the public may render necessary or important. *Warren* v. *City of Grand Haven,* 30 Mich. 24, 28; *Griswold* v. *Bay City,* 35 Mich. 455; *Face* v. *City of Ionia,* 90 Mich. 104.

In *Village of Manchester* v. *Clarkson,* 195 Mich. 354, Justice STEERE said:

"That public alleys involve easements in the nature of ways for the installation of water pipes, sewers and other urban services for the general welfare, under municipal regulation, is well settled."

We are clearly of the opinion that the defendant

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had no right to interfere with any structures rightfully in the alley. That the mains and conduits in question had been lawfully and properly placed in the alley by authority of the city is, we think, too clear for controversy. The defendant made excavation into the alley at his peril. If he did not have from the surrounding objects and monuments sufficient to put him upon notice of the presence of the mains and conduits in the alley, there was at least sufficient evidence to warrant the submission of that question to the jury, which was done by the trial court. The plaintiff and its assignor were, by their mains and conduits, rightfully first in the alley, and their rights were entitled to protection by defendant in such occupancy. *New York Steam Co.* v. *Foundation Co.*, 195 N. Y. 43 (21 L. R. A. [N. S.] 470).

We think that the evidence is uncontradicted that the excavation into the alley by the defendant was the proximate cause of the injury. The original excavation by Ryan & Son had existed for more than 30 days, and it was not until the invasion by the defendant, that the cave-in occurred. We think that the defendant cannot justly complain of the manner in which the question was submitted to the jury by the trial court.

2. Referring to the claim of the defendant relating to the failure of the Central Heating Company to obtain the express permit mentioned in section 4 of its franchise, we are of the opinion that this provision was one for the protection of the city, and was for the purpose of advising the city to whom it should look for the restoration of the street or alley to a condition as good as before it was disturbed, in placing mains, etc. The granting of the permit seems to be mandatory upon the city. The right of the company to lay and maintain its steam pipes in streets and alleys is granted by section 1 of the franchise,

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and its right extends to all of the streets and alleys in the city. There was evidence that the city rendered its bills to the Central Heating Company for inspecting the pavement of the alley, after the heating mains had been installed. We think that the city might waive the requirement, and that it was a matter that did not concern the defendant, and he cannot raise the objection. *International Harvester Co.* v. *Eaton Circuit Judge,* 163 Mich. 55; *Union Telephone Co.* v. *Ingersoll,* 178 Mich. 187.

3. Upon this point it is sufficient to say that there was no evidence that the method or manner of laying the mains and conduits by the plaintiff and its assignor, had been improper, or other than the usual and customary method. Both companies were engaged in furnishing a public service. Their rights under their respective franchises were in the nature of continuing easements, prior to the rights of the defendant in the alley. He had no right to make any use of the alley which would interfere with existing proper public uses thereof. We are not concerned here with the doctrine of lateral support, and shall not discuss that question.

We shall not discuss at length the other points urged by appellant. If there was any error in the rulings relating to the introduction of evidence, we are satisfied that it was harmless error. For instance, we are unable to see, in view of what we have already said, that the putting in evidence of the franchise of the Murphy Heating Company in any way injured the defendant or affected the result. We find no reversible error in the record, and the judgment of the circuit court is affirmed.

OSTRANDER, C. J., and BIRD, STEERE, BROOKE, and FELLOWS, JJ., concurred with STONE, J. MOORE and KUHN, JJ., concurred in the result.

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BILAKOS *v.* KELLEY.

1. NEGLIGENCE—PERSONAL INJURIES—QUESTION FOR JURY.
   In an action for personal injuries alleged to have been caused by the negligent starting of a bread mixing machine by defendants' agent while plaintiff was working thereon, *held*, that the issue raised by plaintiff's testimony was properly one for the jury.

2. NEW TRIAL — CUMULATIVE EVIDENCE — NEWLY DISCOVERED EVIDENCE.
   A motion for a new trial on the ground of newly discovered evidence was properly denied where the evidence was merely cumulative, was upon a question not seriously disputed and not of very great force in the case, and, if admitted, there was no reason to expect a different verdict.

3. TRIAL—INSTRUCTIONS—DIRECTED VERDICT.
   Where the evidence as to defendants' negligence and plaintiff's contributory negligence was sufficient to present a question of fact for the jury, requests to charge, which, if given, would have amounted to the direction of a verdict for defendant, were properly refused.

4. SAME—EVIDENCE—INSTRUCTIONS.
   A request to charge that the jury were not to take into consideration the financial condition of the plaintiff or the defendants was properly refused, in the absence of any evidence upon the question.

5. EVIDENCE — MORTALITY TABLES — PERMANENT INJURIES — DAMAGES.
   Mortality tables were admissible in evidence, in a personal injury case, where plaintiff was permanently injured by the loss of two fingers, impairing his earning capacity.

6. APPEAL AND ERROR—REVIEW.
   Assignments of error not argued in the Supreme Court will not be considered.

7. EVIDENCE—CITY DIRECTORY.
   City directories were not competent to prove who constituted defendant copartnership at the time plaintiff received his injury, several years before the trial.

8. NEGLIGENCE—EVIDENCE—PARTIES—TRIAL—DIRECTED VERDICT.
   Where there was no competent evidence tending to show

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that, at the time plaintiff received his injury, one of the defendants was a member of the copartnership, but, on the contrary, the evidence is most convincing that he did not acquire his interest therein until more than a year thereafter, the trial court should have directed a verdict in his favor.

Error to Wayne; Lamb, J., presiding. Submitted October 22, 1917. (Docket No. 26.) Decided March 27, 1918.

Case by Christ Bilakos against William Kelley and others, copartners as the Olympia Baking Company and Kelley Bros., for personal injuries. Judgment for plaintiff. Defendants bring error. Reversed as to William Kelley and affirmed as to other defendants.

C. Walter Healy, for appellants.

Scott & Stafford (*John H. Engel,* of counsel), for appellee.

Plaintiff filed his declaration in a plea of trespass on the case against:

"Socrates Kelley, William Kelley and D. Caramanos, copartners doing business as the Olympia Baking Company and as Kelley Bros."

From the facts set out in the declaration, proof of which was tendered by plaintiff at the trial, it appears that plaintiff was, on the 3d day of May, 1913, an expert electrician. A day or two prior to said 3d day of May, defendant Socrates Kelley brought plaintiff into the room occupied by the Olympia Baking Company in which was located a bread mixing machine, which was in need of repair. Plaintiff was interrogated as to his ability to repair it and announced that he could make the necessary repairs when the machine was not in use. He was thereupon advised that the machine would not be in use the

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following Saturday afternoon which was the 3d day of May. Plaintiff's testimony tends to indicate that he reached the premises in which the machine in question was located about one o'clock on the afternoon of said day; that the machine was not in operation and that he commenced his work; that the difficulty appeared to be that the gearing, by means of which the machine was operated, had slipped out of place so that the cog wheels did not properly mesh. While at work a man in working clothes, described by plaintiff as an employee of Kelley Bros., came to him and asked if he might operate the machine for the purpose of getting some material out of the mixer. Plaintiff advised this man that in a few minutes he could operate the machine for the purpose named. Soon thereafter this person started the machine by closing an electric switch located upon the wall near the machine and proceeded to remove the contents of the mixer; plaintiff in the meantime sitting on some flour bags in front of the machine. As soon as the contents of the machine had been removed it was stopped by a release of the switch and plaintiff resumed his work upon the gears. It is his claim that when he was so occupied, and with one of his hands holding the gears in place, the machine was suddenly started without warning by the man who had a short time before been operating it. As a result of the alleged unwarranted and tortious act of defendants' servant, the first and second fingers of plaintiff's hand were mutilated and later amputated by the surgeon. The wound became infected and plaintiff was obliged to and did lose considerable time, and introduced testimony tending to prove that his earning capacity, by reason of the loss of his fingers, has been reduced. Upon the merits of the case defendants produced three eyewitnesses who gave testimony tending to show that plaintiff worked upon the machine while it was in

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motion and that immediately after the accident he asserted that it was his own fault.

As bearing upon the right of plaintiff to recover against the defendant William Kelley, evidence was introduced tending to show that while William Kelley was the partner of Socrates Kelley in the firm known as "Kelley Bros.," and while at the time of trial he was likewise a partner with his brother in the "Olympia Baking Co.," he acquired his interest in the latter copartnership at a date later than the 3d day of May, 1913. Upon direct examination he testified:

"I got my knowledge of the existence of the Olympia Baking Co. in 1913 through the contract on file, through knowing the partners and from the city directory."

Upon cross-examination he was asked:

"*Q.* I believe you said you got your information from the city directory?

"*A.* I have from the same people and from the city directory and from the books there, because I was the bookkeeper and I said what they did—who was the partners."

Thereupon the plaintiff offered the city directories for 1911, 1912 and 1913. The entries therein in the issues of 1912 and 1913 being as follows:

"Olympia Baking Company, Kelley Brothers proprietors, wholesale bakers and grocers, 149-151 Monroe avenue."

These exhibits were received over the objection of defendants, and exception followed. At the close of the evidence a motion was made on behalf of defendants for a directed verdict:

First. On the ground that no negligence on the part of either defendant had been shown.

Second. For a directed verdict in behalf of the defendant William Kelley, upon the ground that there was no testimony that William Kelley was a partner

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in the Olympia Baking Company at the time of the alleged injury.

Third. Upon the ground that plaintiff had not shown himself free from contributory negligence.

These requests were denied and the court submitted the case to the jury.

First. Upon the question as to whether there was evidence of negligence on the part of the defendants or their agents.

Second. Whether such negligence was the proximate cause of the plaintiff's injury, and

Third. Whether plaintiff himself was free from contributory negligence.

A verdict was rendered in favor of the plaintiff for $1,200. Thereupon defendants made a motion for a new trial upon various grounds, among them that of newly discovered evidence. This motion was denied and the case is now in this court for review.

BROOKE, J. (*after stating the facts*). The assignments of error are ten in number.

1. The first is based upon alleged error of the court in denying defendants' motion for a directed verdict. We are of opinion that this motion was properly denied and that the issue raised by plaintiff's testimony upon the controlling facts was properly one for the determination of the jury.

2. Error is assigned upon the denial of the motion for a new trial. With reference to this the court said:

"The proposed newly discovered evidence is simply and solely cumulative and is upon a question that is not seriously disputed and is not of any great force in the case. With the testimony in, there is not any reason why the verdict should be any different."

With this conclusion we agree.

3, 4, 5. These assignments are based upon the refusal of the court to give the first, second and third

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requests to charge preferred by the defendants. Each request if given would have amounted to the direction of a verdict for defendant and as we have seen they were all properly refused.

6. Error is assigned upon the court's refusal to give defendants' eighth request:

"I further charge you that you are (not) to take into consideration the financial condition of the plaintiff, or the financial condition of the defendants, William Kelley and Socrates Kelley, during your deliberations or in arriving at your verdict."

This request was properly refused for the reason, *inter alia*, that the record is absolutely barren of any evidence upon the question.

7. Error is assigned with reference to the charge of the court upon the weight to be given to the mortality table which had been introduced by plaintiff. Upon this point it is urged that the mortality tables were inadmissible in the case for any purpose. There can be no question that the loss of two fingers amounts to a permanent injury; in some measure, at least, impairing plaintiff's earning capacity. In such cases the tables are admissible. *Mott* v. *Railway Co.*, 120 Mich. 127; *Sax* v. *Railway Co.*, 125 Mich. 252; *Foster* v. *Village of Bellaire*, 127 Mich. 13.

8, 9. These assignments of error are based upon alleged improper admission of testimony. They are not argued and will therefore receive no consideration.

10. The admission of exhibits 5, 6 and 7, the Detroit city directories for 1911, 1912, and 1913, is assigned as reversible error. We are of the opinion that these directories were not competent to prove who constituted the copartnership known as the Olympia Baking Company, in May, 1913, when plaintiff received his injury. *Tichenor* v. *Newman*, 186 Ill. 264; *Whiton* v. *Insurance Co.*, 109 Mass. 24; *Spalding* v. *Hodges*, 2 Pa. St. 240. We have examined this record with

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care and can find no testimony (if said exhibits are excepted) tending to show that William Kelley was interested in the copartnership owning and operating the Olympia Baking Company at the time of the accident. On the contrary, the evidence of both defendants, Socrates Kelley and William Kelley, as well as the bill of sale introduced in evidence, proves most convincingly that William Kelley did not acquire his interest in the partnership, Olympia Baking Company, until October 31, 1914. Under these circumstances, the learned trial judge should have directed a verdict in favor of defendant William Kelley, as he was requested to do at the close of the testimony.

The judgment is reversed as to defendant William Kelley, who will recover his costs against plaintiff, and affirmed as to the other defendants, against whom plaintiff will recover costs.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred.

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HOLNAGLE *v.* LANSING FUEL & GAS CO.

MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—APPEAL AND ERROR—EVIDENCE.

On certiorari to review an award of compensation by the industrial accident board, under the workmen's compensation act, where there is competent testimony upon which to base its conclusion, the award of the board will not be disturbed.

Certiorari to Industrial Accident Board. Submitted October 23, 1917. (Docket No. 46.) Decided March 27, 1918.

Nellie Holnagle presented her claim for compensation against the Lansing Fuel & Gas Company for the accidental death of her husband in defendant's employ. From an order awarding compensation, defendant and the Fidelity & Casualty Company, insurer, bring certiorari. Affirmed.

Guy W. Moore and *Hal P. Wilson*, for appellants.

Rhoads & Reynolds, for appellee.

MOORE, J. Claimant's decedent, on January 16, 1917, was discovered unconscious, if not dead, lying on the ground near and partly upon a small box in which was a stopcock from which illuminating gas was escaping. He did not regain consciousness and was pronounced dead. The premises belonged to the Lansing Fuel & Gas Company, whose employee claimant's decedent was. A process in the manufacture of illuminating gas is washing it with water, and when delivered into the purifying tank the water which collects at the bottom of the tank is drained through a pipe leading to the outside, having its opening con-

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trolled by the stopcock referred to, in the little wooden box. The stopcock was manipulated with a monkey wrench or Stillson wrench, and it was the daily duty of claimant's decedent to open it and drain the tank of water. The quantity of water varied from day to day, and so the time required to drain the tank varied. On the particular occasion, a fellow employee had, at the request of claimant's decedent, opened the stopcock at about 9 o'clock in the forenoon. The same man had also, a few moments later and a few moments before the body was found, given the deceased man the wrench, upon his request therefor. When the body was found the water had been drained away and the force of escaping gas was blowing the water in the form of vapor several feet into the air.

Illuminating gas contains carbon monoxide and marsh gas (methane), in considerable quantities—of carbon monoxide 30 per cent. and more. These are poisonous gases, and, inhaled, may cause sudden death.

Claimant contends a committee of arbitration and the industrial accident board found that her husband, the deceased, accidentally inhaled enough gas to kill him. Defendants contend there is no evidence supporting this conclusion and none from which the necessary inference may reasonably be drawn. They contend, further, that the evidence quite as well, and better, sustains the conclusion that deceased died from chronic gas poisoning, an occupational disease, or from other disease.

After the body of deceased had been embalmed, in the evening of the day of his death, an autopsy was held, at which six physicians, all of whom gave testimony, attended. The most of a very large record consists of the testimony of these physicians. At the autopsy an examination was made of the organs of the chest and abdomen and of the brain. It was a gross examination — examination by inspection — as

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distinguished from a microscopic examination. The valves of the heart were somewhat hardened.

We will not attempt to recite the evidence in detail.

Dr. Crissey's testimony is very long. In it appears the following:

"*A.* Illuminating gas contains carbon monoxide.

"*Q.* That is true; we are working upon the theory from your statements, that there is carbon monoxide and marsh gas in illuminating gas?

"*A.* Yes, sir.

"*Q.* And that illuminating gas does not break up of its own accord into its several parts?

"*A.* Yes, sir.

"*Q.* Now is it your opinion that one breath of illuminating gas—

"*A.* Yes, sir.

"*Q.* —will cause instant death such as occurred in the case of Mr. Holnagle?

"*A.* Why, certainly.

"*Q.* Will you explain your reason for that?

"*A.* You take a certain volume of carbon monoxide gas and a certain volume of marsh gas, or methane, and mix them and put them in a box or put them in a condenser and let a man breathe that in a certain concentration, it will kill him immediately, just the same as a man going down a well; a man goes down a well and he is found dead clinched to the ladder. What killed him? It is the marsh gas, methane, of which we find something like thirty per cent. in ordinary illuminating gas, from 20 to 30 per cent."

Dr. Davey took part in the autopsy. In his testimony appears the following:

"*Q.* From your examination, doctor, state whether or not there was any indication of anything being abnormal about any of the organs that you examined?

"*A.* There was not.

"*Q.* Did you examine the heart?

"*A.* Yes, sir.

"*Q.* Was there any indication of anything abnormal about the heart?

"*A.* Not that I could find or see.

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"*Q.* From your examination of the organs, are you able to say whether there was any indication of anything that would cause death, anything being wrong with them?

"*A.* No.

"*Q.* What conclusions did you come to as to the cause of death, from your examination?

"*A.* The only conclusions were those of the history of the case. * * *

"*Q.* What were your conclusions?

"*A.* Conclusions were that the man had inhaled a sufficient amount of gas that could be the cause of his death.

"*Q.* There was no indication, from your examination, of any other cause of death?

"*A.* No, sir."

If the owner of an automobile was found unconscious in his closed garage with the engine to his car running, would not one familiar with like situations at once say he had been overcome by inhaling the exhaust from the engine. The inferences to be drawn from the circumstances in the instant case are of like kind to that drawn in the suppositious case, though perhaps differing in degree.

We have so often held, as to not require the citation of authorities, that, if there is competent testimony upon which to base the conclusion of the industrial accident board, we will not disturb it. In the instant case there was such testimony.

The award is affirmed, with costs.

OSTRANDER, C. J., and BIRD, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

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THEISEN *v.* DETROIT TAXICAB & TRANSFER CO.

1. EVIDENCE—CONVERSATION BY TELEPHONE—ADMISSIBILITY.
   A telephone conversation is admissible in evidence, where the identity of the person communicated with by telephone is established.

2. SAME—JUDICIAL NOTICE—TELEPHONES—NECESSITY.
   The court will take judicial notice of the fact that a modern invention, such as the telephone, is a necessity in the conduct of business especially in the large cities.

3. TELEGRAPHS AND TELEPHONES—INVITATION TO USE—PRESUMPTIONS—IDENTITY.
   A business man who installs a telephone in his office invites the public to transact business with him by its use with knowledge of existing presumptions and inferences in the business world that usually the person answering the telephone is the person called for and is the person whom he represents himself to be.

4. EVIDENCE—TELEPHONE CONVERSATION—ADMISSIBILITY—IDENTITY.
   Where two parties are subscribers to the same telephone exchange, and one party, using the telephone directory to ascertain the number of the other party, calls for such other party, and is connected by central with such other party, and a conversation ensues in which the party called responds and informs the party calling that he is the party called, *held*, sufficient to raise a rebuttable presumption or inference to make a *prima facie* case of identity.

5. SAME—AUTOMOBILES—PRINCIPAL AND AGENT—IDENTITY.
   In an action for damages to plaintiff's automobile caused by a collision with a taxicab, evidence of a telephone conversation by plaintiff's son with a person in defendant's office, who said he was its manager, that the taxicab belonged to defendant, and that the driver had reported the accident, *held*, admissible for the purpose of identifying the owner of the taxicab.

6. PRINCIPAL AND AGENT—HOLDING OUT BY PRINCIPAL—NAME OF AGENT ON LETTER-HEADS.
   Agency may be inferred from the fact that circulars and letter-heads of the defendant described one as its agent.

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Error to Wayne; Perkins, J., presiding. Submitted January 10, 1918. (Docket No. 40.) Decided March 27, 1918.

Case in justice's court by John W. Theisen against the Detroit Taxicab & Transfer Company for damages to plaintiff's automobile. From a judgment for defendant, plaintiff appealed to the circuit court. Judgment for plaintiff. Defendant brings error. Affirmed.

Clarence E. Lehr, for appellant.

Julius J. Lechner and *William R. McCredie,* for appellee.

Plaintiff's automobile was damaged in a collision with a taxicab at the intersection of 16th street and Michigan avenue, in the city of Detroit, and he brought this suit in justice's court to recover for such damages. Upon appeal he recovered a judgment for $66.30. Upon the trial in the circuit court plaintiff introduced evidence of the collision of his automobile with a taxicab under such circumstances as would render the owner of the taxicab liable, proved the amount of his damages, and rested without introducing evidence connecting defendant with the ownership of the taxicab. Defendant thereupon moved for a directed verdict on this ground. The court, without deciding the motion, allowed plaintiff to reopen his case and put in further testimony. One of plaintiff's attorneys testified that he wrote defendant with reference to the accident and that shortly thereafter a man called upon him, said he was the driver of the taxicab which injured plaintiff's car and that he was driving the taxicab for the defendant. On motion this testimony was stricken out as hearsay. Plaintiff assigns error upon this, although he appears to have acquiesced in the ruling. Plaintiff also pro-

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duced his son as a witness and he testified that he called up the defendant by telephone, using the telephone directory, and asked for the manager, that he got hold of Mr. Paige, who said he was the manager and discussed with him the accident to his father's car; that Mr. Paige said their driver had reported the accident and witness informed him it was his father's car; that Mr. Paige said the taxicab belonged to defendant and that they would send the driver out to see witness. Witness also stated that the driver came out to see him the next day, but as he was not there this statement must be treated as hearsay. Defendant developed, on cross-examination of this witness, that he had never talked with Mr. Paige before, and that he based his testimony that it was Mr. Paige on the statement over the phone that it was Mr. Paige, and defendant then asked to have the testimony of this witness stricken out, which motion was overruled. Defendant further developed, on the cross-examination of this witness, that he had seen bills of defendant and upon them it appeared that Mr. Paige was the president of defendant's company. Plaintiff again rested and the court then refused to direct a verdict for defendant. No testimony was offered by defendant and the case was submitted to the jury with a charge upon which no error is assigned. No claim is made that there is more than one telephone company in Detroit, or that there are any special circumstances in the case which render the telephone conversation here testified to inadmissible if such conversations are admissible without identifying the voice of the party called.

FELLOWS, J. (*after stating the facts*). The important questions presented on this record are the admissibility of the telephone conversation and its effect. Upon these questions the authorities are not in harmony. This court has already held that a telephone

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conversation is admissible where the identity of the persons communicated with by telephone is established. *Harrison Granite Co.* v. *Railroad Co.*, 145 Mich. 712. The contention here goes further, and we are now called upon to determine the admissibility and effect of a telephone conversation conducted in the usual manner in the business world, by ascertaining through the directory the number of the subscriber and then being connected with that subscriber through "central" and conducting such conversation.

Courts must take judicial knowledge of modern discoveries and inventions that have become of general and almost universal use in our commercial life. The telephone is no longer a luxury or even a mere convenience, but is a necessity in the conduct of business, especially in our large cities. We cannot close our eyes to the fact that a very large and considerable portion of the business of the country is transacted over it and by its use, nor that mistakes in connections are infrequent and when they occur the party calling is at once informed of the mistake by the party at the other end of the line. We cannot close our eyes to the fact that business transactions of large moment and private affairs daily depend upon the presumption and inference that, by the use of the telephone, parties have conversed with the actual party called, and that the party answering was, in the absence of a mistaken connection, the person called for and was the person whom he represented himself to be. The business man who installs a telephone in his office invites the public to transact business with him by its use, and he extends such invitation with the knowledge that such presumptions and inferences exist in the business world.

We have stated that the authorities are not in harmony, but we are persuaded that those cases holding such conversations admissible are by far the better

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reasoned, and that the weight of authority sustains the admissibility of such proof. Most of the cases to the contrary pass the question with but little discussion, and some of them are earlier cases before telephones became so thoroughly tested and entrenched in business life. None of the cases sustaining the admissibility of such conversations, so far as we can ascertain, lose sight of the rule that agency may not be proved by statements of the agent, nor the rule that the authority of the agent must be established to bind the principal by his acts, but proceed upon the theory, based upon business experience, that when one in the usual manner obtains the office of another on the telephone a presumption or inference arises sufficient to make a *prima facie* case that the person who is in fact summoned to the telephone, and who conducts the negotiations, is authorized so to do, rather than to assume, until the contrary is proved, that he is an officious intermeddler with the affairs of others.

Mr. Wigmore, in his work on Evidence (Vol. 3, § 2155), written in 1904, says:

"In proving the receipt of a communication by telephone, any one of several distinct principles of evidence may be involved and give rise to distinct objections, whose validity may rest on different considerations.

"(1) B asserts that certain words (assumed to be receivable as admissions or the like) were uttered to him by A over the telephone; how can B testify that the antiphonal speaker was A? This involves genuinely the principle of authentication; and three situations are to be distinguished:

"(*a*) It is generally conceded that a person may be recognized and identified by his voice, if the hearer is acquainted with the speaker's voice. Assuming, then, that B is thus acquainted with A's voice, and that voices can sometimes be distinguished on the telephone, and that B did in this instance distinguish A's voice, then B's belief that A was the speaker is founded on

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sufficient evidence. This much seems to be generally accepted.

"(*b*) But if there is no recognition of voice, what can supply sufficient evidence to authenticate the antiphonal speaker? In a given case, no doubt, sundry circumstances (including other admissions, and the like) may suffice. But, apart from special circumstances, can any rule be laid down? No one has ever contended that if the person first calling up is the very one to be identified, his mere purporting to be A is sufficient, any more than the mere purporting signature of A to a letter would be sufficient. The only case practically presented therefore is that of B's calling up A and being answered by a person purporting to be A. There is much to be said for the circumstantial trustworthiness of mercantile custom, by which, in average experience, the numbers in the telephone-directory do correspond to the stated names and addresses, and the operators do call up the correct number, and the person called does in fact answer. These circumstances suffice for some reliance in mercantile affairs; and it would seem safe enough to treat them in law as at least sufficient evidence to go to the jury, just as testimony based on prices-current is received. This view has received some judicial support.

"(*c*) An additional element enters where the antiphonal speaker does not purport to be a particular person, but merely some member of the office-staff authorized to make a contract or an admission. Here the question is whether there is sufficient evidence that he was really a person acting in the opponent's office and authorized for such transactions, or was a mere intruder, or bystander, or unauthorized clerk. On the principle above suggested (though not with the same force) mercantile experience may well suffice, by which customarily the person who is in fact summoned to the telephone and proceeds to conduct the negotiation is *prima facie* a person authorized to do so, precisely as a person receiving money at the cashier's desk is presumably authorized to do so. Upon this point there is little judicial inclination to take the liberal view.

"In any event, particular additional circumstances may always suffice to complete the gap."

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Since the publication of Mr. Wigmore's work, the supreme court of California has considered this question at some length in the case of *Union Construction Co.* v. *Telegraph Co.*, 163 Cal. 298. In this case a Mr. Veeder testified that he called the central telephone office and asked to be connected with the office of defendant telegraph company; the connection was made and some one responded, apparently at the Western Union office. He inquired if that was the Western Union Telegraph office, and received the answer "yes." He did not recognize the voice and had no means of knowing that he was connected with defendant's office, other than that he had made the call in the usual way. The court considers the rules we have heretofore adverted to with reference to proof of agency, and says:

"We are of the opinion, however, that there was sufficient circumstantial evidence to make a *prima facie* case of identity and authority."

The court then proceeds to discuss the question, and, after considering it fully, announces the following rule:

"For these reasons we conclude that when it appeared that plaintiff and defendant each maintained a business office in the same city, that each had a telephone in such office connecting with the same city telephone system, with their respective names and numbers in the regular telephone directory, that plaintiff called on the operator at the central station, in the usual way, for a connection with defendant's office, that a connection was thereupon made at the central station with some line, apparently in the usual manner, that some one responded at the other end of the line, and, being asked answered that the end was the office of the Western Union Telegraph Company, there was sufficient *prima facie* proof that the person answering was the agent of the defendant at its said office, employed there by it to receive for it such communications as should come in that manner. All of

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these conditions were shown to exist upon the trial of this case, either by direct evidence or by fair and reasonable inference, or as matters of judicial knowledge."

After calling attention to the authorities on the question, the court says:

"The general rule, as gathered from the foregoing decisions, is that where it is shown that the witness called up the other party at his place of business, through the central station with which both were connected, and received a response as in the usual course of business over the telephone, this is sufficient *prima facie* identification of the speaker at the other end of the line as the party called, or his authorized agent, and that, upon such proof, the ensuing conversation, if otherwise admissible, may be testified to by the witness. It is proper to add that the weight of such evidence depends largely upon the circumstances of each case and is always a question for the trial court or jury."

The supreme court of Illinois has also considered this question since the publication of Mr. Wigmore's work on Evidence, in the case of *Godair* v. *National Bank*, 225 Ill. 572. In this case a witness who was formerly cashier of the bank was permitted to testify that he called up the Godair Commission Company by telephone and asked for Mr. Godair, but was informed that he was out; later the commission company called up the bank and said the party wanted by the bank was now in, and he thereupon had the conversation in which he inquired if drafts of one Moreland upon the Godair Commission Company would be paid. The party he talked with said they would. The witness did not know Mr. Godair, did not recognize his voice, and could not say with whom he talked. It was held that the testimony was admissible and its weight was for the jury.

Among the cases to the same effect, which have been decided since the publication of Mr. Wigmore's

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work on Evidence, will be found the following: *Conkling* v. *Standard Oil Co.*, 138 Iowa, 596; *Knickerbocker Ice Co.* v. *Gardiner Dairy Co.*, 107 Md. 556; *Gilliland & Gaffney* v. *Railway*, 85 S. C. 26; *Holzhauer* v. *Sheeny*, 127 Ky. 28; *General Hospital Society* v. *Rendering Co.*, 79 Conn. 581; *Barrett* v. *Magner*, 105 Minn. 118. There are others but we cite these as supporting and sustaining Mr. Wigmore's text.

In the case of *Reed* v. *Railway Co.*, 72 Iowa, 166, the court, in considering an objection to a telephone communication, said:

"It is claimed that the testimony as to the communication by telephone should have been excluded, because it was with some unknown person, and ought not to bind the defendant. It appears that the telephone was placed in the yards for the very purpose of communicating with the office. It was the means of communication provided by the defendant; and, in the absence of any testimony showing that some officious intruder had taken up quarters in the office, and assumed to transact the business of the company, it ought to be presumed that the communication was made with one having authority to give directions as to the matter inquired about. * * *"

In *Wolfe* v. *Railway Co.*, 97 Mo. 473, the court, speaking through Mr. Justice Barclay, said:

"A question arose incidentally at the trial upon the admission in evidence of a conversation held through the telephone between some one at the instrument in plaintiffs' private office and the witness. It was admitted, though the witness did not identify the voice of the speaker as that of either of the plaintiffs or their clerk. The courts of justice do not ignore the great improvement in the means of intercommunication which the telephone has made. Its nature, operation and ordinary uses are facts of general scientific knowledge, of which the courts will take judicial notice as part of public contemporary history. When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication, in relation to his busi-

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ness, through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business there carried on. The fact that the voice at the telephone was not identified does not render the conversation inadmissible. The ruling here announced is intended to determine merely the admissibility of such conversations in such circumstances, but not the effect of such evidence after its admission. It may be entitled, in each instance, to much, or little weight in the estimation of the triers of fact, according to their views of its credibility, and of the other testimony in support, or in contradiction of it."

In the case of *Western Union Tel. Co.* v. *Rowell*, 153 Ala. 295, the plaintiff testified to calling the telegraph company by telephone and having a conversation with the person who answered the phone after the connection was made. The evidence elicited by the conversation over the telephone tended to show that the telegraph company was lacking in diligence in the delivery of the message. It was held that the evidence was admissible and its weight was for the jury.

See, also, the following cases: *Globe Printing Co.* v. *Stahl*, 23 Mo. App. 451; *Rock Island, etc., R. Co.* v. *Potter*, 36 Ill. App. 590; *Rogers Grain Co.* v. *Tanton*, 136 Ill. App. 533; *Guest* v. *Railroad Co.*, 77 Mo. App. 258; *Oskamp* v. *Gadsden*, 35 Neb. 7; *Kansas City Star Pub. Co.* v. *Warehouse Co.*, 123 Mo. App. 13.

In the instant case it is not necessary that we go as far as the rule which has been adopted in some of the cited cases goes; it is sufficient that we hold and we do hold, that where both parties are subscribers to the same telephone exchange and one party, using the telephone directory to ascertain the number of the other party, calls for such other party, and is connected by central with such other party, and a conversation ensues in which the party called re-

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sponds and informs the party calling that he is the party called, that, upon proof of such facts, a rebuttable presumption or inference arises sufficient to make a *prima facie* case of identity.

The testimony shows that bills of defendant bore the name of Mr. Paige as president of the company. This court has held that agency may be inferred from the fact that circulars and letter-heads of the defendant described one as its agent. *Randall* v. *J. A. Fay & Egan Co.*, 158 Mich. 630. See, also, *Austrian & Co.* v. *Springer*, 94 Mich. 343. There was no error in receiving the telephone conversation in evidence or in refusing to direct a verdict for the defendant.

The judgment is affirmed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred.

CITY OF KALAMAZOO *v.* KALAMAZOO CIRCUIT JUDGE.

1. MUNICIPAL CORPORATIONS—ORDINANCES — PENALTY — EQUITY — VALIDITY.

   Penalties provided in a city ordinance for its violation may be so excessive as to give an equity court jurisdiction to restrain its enforcement.

2. SAME—GAS—QUESTION OF LAW.

   That a gas company dealt with numerous customers and that its violations of an ordinance would be numerous, does not of itself render the penalty excessive; and since the purpose of the penalty is to secure enforcement of the ordinance, if the penalty is not excessive in each particular case, it is not excessive, as a matter of law, so as to render the ordinance void.

3. SAME—GAS RATES.

   A city is not incapacitated from fixing gas rates because it is itself a user of gas and therefore a purchaser.

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4. SAME—CONSTITUTIONAL LAW — HIGHWAYS AND STREETS — CONTROL OF STREETS—JUDICIAL QUESTION.

Under section 28, art. 8, Const. 1909, providing that "the right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships," a city has the power to fix reasonable rates as a condition to the use of the streets by public utilities; the question as to the reasonableness of the condition being for the courts.

5. SAME—PUBLIC UTILITIES—REASONABLE CONDITION.

When a reasonable condition upon the use of the streets is imposed, a public utility may either accept or reject it; if it rejects, it may not occupy the streets, and if already in possession under an expired franchise it may be ousted.

6. SAME—CONTROL OF STREETS—GAS RATES—ORDINANCES—RIGHT TO CONTRACT—LEGISLATIVE FUNCTIONS.

The power of a municipality to prescribe the rate at which gas shall be furnished to its inhabitants under its constitutional right to a reasonable control of its streets, is in the nature of a right to contract, and in its exercise it may not enforce its mandates by proceedings *quasi* criminal in character and penal in their nature, which is a legislative, governmental function, and, before it may be exercised, must be delegated to it in express terms or by necessary implication.

7. SAME—KALAMAZOO CHARTER—LEGISLATIVE FUNCTIONS.

The city of Kalamazoo, acting under a special charter (Act No. 475, Local Acts 1897), did not possess the power to prescribe, by an ordinance enforceable by a penalty, the rate at which gas should be furnished to its inhabitants; such power not having been delegated to it by the legislature in its charter.

8. SAME—HOME RULE CHARTERS.

As to the rights of municipalities operating under home rule charters, so-called, the question is not before the court and is not considered.

Mandamus by the city of Kalamazoo to compel George V. Weimer, circuit judge of Kalamazoo county, to vacate an order dismissing an action for the violation of an ordinance. Submitted January 29, 1918. (Calendar No. 28,189.) Writ denied March 27, 1918.

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Marvin J. Schaberg and *Harry C. Howard*, for relator.

Alfred J. Mills and *John C. Weadock*, for respondent.

Divie B. Duffield, amicus curiæ.

The city of Kalamazoo, at the time of the enactment of the ordinance here involved, was acting under a special charter (Act No. 475, Local Acts 1897). On the 9th of December, 1856, the Kalamazoo Gas Light Company was incorporated under the provisions of Act No. 109, Laws 1855 (chap. 190, 2 Comp. Laws). It was reincorporated February 10, 1891, and its corporate existence extended 30 years; its successor, Kalamazoo Gas Company, was incorporated December 20, 1899, under the same act, and was succeeded by the Michigan Light Company, which was the only company producing gas in the city at the time this controversy arose. It will hereafter be called the defendant. On June 28, 1894, the Kalamazoo Gas Light Company applied to the council of the city of Kalamazoo for consent to lay mains and services in the streets of that city, and on that day an ordinance, known as Ordinance No. 121, was passed by the city council by which such consent was given. Various conditions unnecessary to detail were contained in this ordinance and the price of gas to consumers was fixed. This ordinance was accepted by the company. By its terms it ran "for the period of 22 years from and after the time when this ordinance shall take effect," which was July 14, 1894. It therefore expired July 14, 1916. Before its expiration the city conducted an extensive investigation into the cost of producing gas, and on July 10, 1916, the city council passed an ordinance, known as Ordinance No. 382, and which it was provided should become effective August 1, 1916. This ordinance is very carefully drawn and fixes the rate

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for gas at 75 cents per thousand feet. It provides for penalties upon conviction for its violation in amounts varying from $50 to $200, and declares:

"This ordinance shall not be construed in any way as a franchise, but is merely regulatory, and the city council reserves the right to alter, amend, or repeal this ordinance at any time, and to make such further rules, orders and regulations as may from time to time be deemed necessary to the city council to protect the interest, safety and welfare of the public, or the rights of property of the city of Kalamazoo."

After this ordinance by its terms took effect the defendant Michigan Light Company continued to collect from consumers its regular rates which were higher than those fixed by the last mentioned ordinance, and lower than were fixed by the ordinance of 1894. The city thereupon brought suit in the municipal justice's court for the recovery of the penalty named in the ordinance of 1916, and, failing to there recover, took an appeal to the circuit court. There the plaintiff filed a petition with supporting affidavits, praying for an order permitting it to examine the books and records of defendant, and defendant filed a motion to dismiss the case on the grounds of the invalidity of the ordinance. The trial court dismissed the suit, holding the ordinance invalid. The circuit judge having declined to entertain jurisdiction, we issued an order to show cause why said order dismissing the suit should not be set aside.

FELLOWS, J. (*after stating the facts*). Two minor objections are made to the validity of this ordinance. These we will first consider.

It is insisted that the penalties are excessive, and it is pointed out that, due to the large number of consumers with which the gas company deals, in the aggregate the sums for which the company would be liable in penalties would be enormous. This fact may

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be sufficient to give an equity court jurisdiction to entertain a bill filed to test its validity and to restrain enforcement of its provisions *pendente lite*. *Smyth* v. *Ames*, 169 U. S. 466, 517; *Ex parte Young*, 209 U. S. 123. But the fact that the gas company dealt with numerous customers and that its violations of the ordinance would be numerous does not of itself render the penalty excessive. If the penalty is not excessive in each particular case it is not excessive as matter of law. The purpose of the penalty is to secure the enforcement of the ordinance and we cannot agree with counsel that the ordinance is void for excessive penalties.

Nor are we able to follow counsel in his contention that the city of Kalamazoo was incapacitated from fixing gas rates because of the fact that the city was a user of gas, and, therefore, could not, as such purchaser, fix the price to itself and its inhabitants, as was held in *Cleveland Gas Light & Coke Co.* v. *City of Cleveland*, 71 Fed. 610, and *Agua Pura Co.* v. *Mayor, etc., of Las Vegas*, 10 N. M. 6 (50 L. R. A. 224). The decisions of the United States Supreme Court, holding the contrary doctrine, *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347, 353, and *Home Telephone Co.* v. *City of Los Angeles*, 211 U. S. 265, 279, are persuasive to us that this point is not well taken. See, also, section 509, Pond on Public Utilities.

This brings us to the consideration of the main questions in the case.

Section 28, art. 8, of the Constitution, provides:

"No person, partnership, association or corporation operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any city, village or township for wires, poles, pipes, tracks, or conduits, without the consent of the duly constituted authorities of such city, village or township; nor to transact a local business therein without first obtaining a franchise therefor from such

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city, village or township. The right of all cities, villages and townships to the reasonable control of their streets, alleys, and public places is hereby reserved to such cities, villages and townships."

The last sentence of this section is the provision to which, in the main, the briefs and arguments in the final analysis are addressed, and to which we shall now give attention. The defendant insists that this provision of the Constitution does not confer upon municipalities the power to fix rates as a condition to the use of the streets by public utilities. The contention goes to the right of municipalities to fix any rate, however reasonable it may be, as a condition to the use of the streets. This contention we shall first consider, and it must be constantly borne in mind that we are now dealing with the question of affixing a condition, and not with the question of prescribing a legislative rate, to which subject we shall later refer. It will not be practical to consider all the authorities to which our attention has been challenged by counsel; they have all been carefully read, together with many others which we have examined. We shall, however, consider sufficient of them to show the trend of decision in this and other States, and to demonstrate that the States are not in harmony on the important questions here involved.

The holdings of the supreme courts of Missouri and Wisconsin are illustrative of the cases relied upon by defendant's counsel. In *City of St. Louis* v. *Telephone Co.*, 96 Mo. 623 (2 L. R. A. 278), the court said:

"That the company is subject to reasonable regulations prescribed by the city, as to planting its poles and stringing its wires and the like, is obvious. Such regulations have been obeyed by this defendant. Conceding all this, we are at a loss to see what this power to regulate the use of the streets has to do with the power to fix telephone charges. The power to regulate the charges for telephone service is neither in-

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cluded in nor incidental to the power to regulate the use of streets, and the ordinance cannot be upheld on any such ground."

In *State, ex rel. Wisconsin Telephone Co.*, v. *City of Sheboygan*, 111 Wis. 23, the supreme court of Wisconsin said:

"The power to regulate charges was not included in or incidental to the power to regulate the manner of using streets. There is not the remotest relation between them. The attempt of the city to justify its position on that ground must fail."

Other cases are cited and are found sustaining this doctrine and we are urged to adopt it in the instant case. But this court has adopted a contrary doctrine, and had held, prior to the adoption of the present Constitution, that language quite similar to that here under consideration permitted the city of Detroit to attach conditions to its consent to the use of its streets by a gas company, and that as a condition it might fix reasonable rates. *Boerth* v. *Detroit City Gas Co.*, 152 Mich. 657. Speaking of the right to attach such conditions, it was there said by Mr. Justice CARPENTER, speaking for the court:

"It is clear, too, that it may attach conditions to its consent. What conditions? May it prescribe the rates at which gas shall be furnished to its inhabitants? The statute does not say in express terms that it can. Is it forbidden? It certainly is not forbidden in express terms. The only language in the statute limiting the authority of the municipality is to be found in the language authorizing the municipality to prescribe reasonable regulations for the laying of the pipe. Without undertaking to definitely determine what is meant by reasonable regulations, it is quite clear that nothing but unreasonable regulations are prohibited. Authority to prescribe rates then is not prohibited unless that authority may be properly denominated unreasonable. Is it unreasonable? There is no doubt that the municipality may determine for

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what length of time a gas company may use its streets for conveying gas. It had, therefore, authority—an authority exercised in this case—to determine that the gas company should use the streets for a period of 30 years, for the purpose of supplying its inhabitants with gas. Is it unreasonable for the city to prescribe the rates at which gas shall be furnished to its inhabitants? If the city cannot perscribe those rates, consumers of gas must pay whatever price the gas company asks or resort to litigation, and pay what is there determined to be reasonable. * * * As a practical proposition it may be said, then, that consumers must either pay the rates fixed by the company or the rates prescribed by municipal authority—in the absence, as in this case, of any action by the legislature. It may be said, then, that in order to safeguard the rights of its inhabitants who use gas, it is not only not unreasonable that the city should have the power to fix rates, but it is highly expedient—indeed, it is necessary—that it should possess that power. It is therefore quite clear that there is nothing in the statute which either in express terms or by proper construction prohibits the city prescribing rates at which gas shall be furnished to its inhabitants."

We repeat that it must be borne in mind, however, that this court was there considering a rate which had been fixed by contract, not by legislative action of the city, and that it was there conceded that the city of Detroit possessed no power to fix a rate by such legislative action.

In addition to the authorities cited by Mr. Justice CARPENTER, may be found the following: *City of Noblesville* v. *Improvement Co.*, 157 Ind. 162, 169; *City of St. Marys* v. *Hope Gas Co.*, 71 W. Va. 76 (43 L. R. A. [N. S.] 994); *The Long Branch Commission* v. *Water Co.*, 70 N. J. Eq. 71; *Simons Sons Co.* v. *Telegraph Co.*, 99 Md. 141, 176. In the Indiana case the court said:

"The city had the unquestionable right to grant to any person, firm or corporation a franchise to occupy

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its streets and alleys for conveyance of gas to customers. But it was under no compulsion to convey such right to any one. The subject of grant rested in contract like any other matter. As the price of the right the city was at perfect liberty to demand that the charges for gas furnished the city and its inhabitants should not exceed certain prices. The appellee was at perfect liberty to reject or accept the city's proposal. The terms proposed on the one hand and accepted on the other made a contract as valid and enforceable as if made by two individuals."

In the West Virginia case the court said:

"We see no reason why a town may not make a contract to accomplish a function with which it is charged or empowered, binding it and the other party. He, accepting, is plainly bound, and cannot say the town's act is void."

In the Maryland case the court had under consideration a legislative ordinance, but, speaking of the control over the streets of the city, said:

"It would seem to be but a reasonable incident to, and exercise of, the power to regulate the use of the streets and highways which has been conferred by the provision of law we are here considering, that, where a public service corporation gets permission to use such streets and highways for its corporate purposes, and such purposes consist in making contracts with the citizens of the municipality to which the power is entrusted, and exacting from them compensation for a service that for urgent reasons of convenience or the necessities of business conditions they must avail of, the permission can be granted under such regulations as to rates of charges as will protect the community against extortionate exactions and secure fair and reasonable terms in availing of the facilities which the corporation furnishes."

It seems, therefore, clearly admissible, under the language of the Constitution here under consideration, that the municipalities of the State having "reasonable control of their streets," may affix reasonable conditions for their use by public utilities, and that, among

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such reasonable conditions, is the fixing of a reasonable rate. That such conditions must be reasonable, the language of the Constitution clearly demonstrates. *People* v. *McGraw*, 184 Mich. 233, and that the courts may determine the question of whether conditions imposed are reasonable or not, this court has determined. *Michigan Telephone Co.* v. *City of St. Joseph*, 121 Mich. 502. Municipalities may not act arbitrarily or captiously, but when a reasonable condition upon the use of the street is imposed the public utility is at liberty to accept or reject it. If it rejects, it may not occupy the streets, and if already in possession under an expired franchise it may be ousted. *Detroit United Ry.* v. *City of Detroit*, 229 U. S. 39. May we not assume that the Constitutional Convention had the holding of this court in the *Boerth Case* in view when this provision was framed?

We have thus far considered the administrative power of municipalities, their power to contract, to fix reasonable conditions. We now pass to their power to legislate. These two powers are of entirely different character. The one of a proprietary nature, the other governmental in its character. The one permitting agreements, the other controlling action; the one private, the other public. It is said in 1 Dillon on Municipal Corporations (5th Ed.), § 109:

"In *its governmental or public character*, the corporation is made, by the State, one of its instruments, or the local depositary of certain limited and prescribed political powers, to be exercised for the public good on behalf of the State rather than for itself. In this respect it is assimilated, in its nature and functions, to a county corporation, which, as we have seen, is purely part of the governmental machinery of the sovereignty which creates it. Over all its civil, political, or governmental powers, the authority of the legislature is, in the nature of things, supreme and without limitation, unless the limitation is found in the Constitution of the particular State. But in *its pro-*

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prietary or private character, the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the State at large, but for the private advantage of the compact community which is incorporated as a distinct *legal personality or corporate individual;* and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded *quo ad hoc* as a private corporation, or at least not public in the sense that the power of the legislature over it or the rights represented by it, is omnipotent."

Judge Sanborn, speaking for the circuit court of appeals for the eighth circuit, in the case of *Illinois Trust & Savings Bank* v. *City of Arkansas City,* 76 Fed. 271, said:

"A city has two classes of powers—the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other, proprietary, *quasi* private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class it is governed by the rule here invoked. In their exercise it is ruling its people and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation."

And a large number of authorities are cited. See, also, the quotation from the case of *City of Indianapolis* v. *Gas-Light & Coke Co.,* 66 Ind. 396, found in Mr. Justice CARPENTER'S opinion in the *Boerth Case; Safety Insulated Wire & Cable Co.* v. *Mayor, etc., of Baltimore,* 66 Fed. 140. It is evident, therefore, that in the exercise of the administrative power the muni-

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cipality may contract, and may reasonably refuse the use of public property in which its interest is proprietary, but it may not inflict penalties for an invasion of its proprietary rights; while in the exercise of its legislative, governmental functions it may enforce its mandates by proceedings *quasi* criminal in character and penal in their nature.

It cannot be doubted that where the owner of property devotes it to a use in which the public has an interest he submits it to the extent of that interest to public control, and where the property is devoted to a public use and is charged with such public interest the State, in the interest of the public, may prescribe reasonable rates for such public use. *Munn* v. *Illinois*, 94 U. S. 113. But, except by contract, the fixing of rates is a governmental legislative function. Pond on Public Utilities, § 419; 3 Dillon on Municipal Corporations (5th Ed.), § 1325; *Home Telephone Co.* v *City of Los Angeles*, 211 U. S. 265. It may be delegated to the municipality. *Home Telephone Co.* v. *City of Los Angeles*, 155 Fed. 554, and authorities hereinafter considered.

The exercise of this governmental legislative function, this attribute of sovereignty, must be delegated in express terms or by necessary implication. 20 Cyc. p. 1166, lays down the rule in the following language:

"In the absence of charter authority or other statutory or constitutional provisions delegating the power in express terms or by necessary implication, it is the rule that a municipal corporation has no power to fix by ordinance the price at which a gas company shall supply its consumers."

This language was adopted in *City of Richmond* v. *Natural Gas Co.*, 168 Ind. 82 (11 Am. & Eng. Ann. Cas. 746).

In *Omaha Electric Light & Power Co.* v. *City of Omaha*, 179 Fed. 455, it was said:

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"Legislative grants of power to municipal corporations must be strictly construed, and cannot operate as a surrender of legislative power, except so far as expressly delegated or is indispensably necessary to the exercise of some other power which has been expressly delegated."

In *Mills* v. *City of Chicago*, 127 Fed. 731, the court says:

"A municipal corporation possesses only such power as is granted by the legislature in express words, or such as is fairly implied from power expressly granted, or is essential to the specific object and purposes of municipal existence. No one has pretended that the regulation of the price of gas is essential to the specific object for which the city of Chicago was created; hence that source of possible power may be dismissed without further discussion."

See, also, *Water, Light & Gas Co.* v. *City of Hutchinson*, 207 U. S. 385; *Minneapolis General Electric Co.* v. *City of Minneapolis*, 194 Fed. 215; *Wabaska Electric Co.* v. *City of Wymore*, 60 Neb. 199.

We are unable to find any provision of the charter of the city of Kalamazoo delegating the governmental power to the city to fix rates for gas used by consumers, either expressly or by necessary implication; nor has any such provision been called to our attention. But counsel for the city most strenuously urge that governmental power is conferred by the language of the Constitution above quoted. With this contention we cannot agree. Upon principle the question is ruled by *City of Detroit* v. *Detroit United Ry.*, 172 Mich. 136, a case determined since the adoption of the present Constitution. This court there held that a public utility corporation whose franchise to occupy the street had expired was a continuing trespasser, and, upon reasonable notice, could be required to remove its property from such streets, but that the city could not, by its own mandate, fix a fee for the use of such streets and enforce its collection.

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In the case of *Bluefield Water Works & Improvement Co.* v. *City of Bluefield*, 69 W. Va. 1 (33 L. R. A. [N. S.] 759), the court said:

"This corporation, chartered by the State, could not obtain the right to occupy the streets of the city or do business therein under its State franchise, without the consent of the city. In order to obtain that consent, it was bound to submit itself to such regulatory conditions as the city saw fit to impose."

But the court further said:

"The regulation of rates for public service belongs to the police power of the State. *Coal & Coke R. Co.* v. *Conley*, 67 W. Va. 129. The State has very ample powers for the control and government of corporations and the transaction of their business, and may no doubt ordain and enforce such regulative measures as are embodied in the ordinance complained of, and enforce compliance therewith by making failure to observe them a criminal offense, punishable by fine. But municipal corporations do not possess all the police powers of the State. They have only such portions thereof as are granted to them by the legislature in express terms or by necessary implication."

And it was held that the rates fixed might not be enforced through the penalty provided in the ordinance. This case sustains the doctrine that while the city in the exercise of control over the use of its streets may impose conditions, it may not, by virtue of that power, enact an ordinance fixing rates to be enforced by penalties.

That the want of power to legislatively fix a rate does not prevent the execution of a contract, is illustrated by the case of *City of Noblesville* v. *Improvement Co., supra,* where it is said:

"That the city had no power to regulate the rates of its licensee makes no difference. It had the power to contract. And the power to regulate as a governmental function, and the power to contract for the same end, are quite different things. One requires

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the consent only of the one body, the other the consent of two. In this instance the city acted in the exercise of its power to contract, and it is therefore entitled to the benefits of its bargain."

In *City of St. Mary's* v. *Hope Gas Co., supra,* it was held that the city might, in the control of the use of its streets, prescribe conditions including the fixing of rates for gas, and might contract therefor, even though it possessed no governmental power to fix rates.

The distinction between fixing rates by contract and under governmental power was clearly recognized by the Supreme Court of the United States in the case of *City of Detroit* v. *Railway Co.,* 184 U. S. 368, where it was said:

"It is plain that the legislature regarded the fixing of the rate of fare over these street railways as a subject for agreement between the parties and not as an exercise of a governmental function of a legislative character by the city authorities under a delegated power from the legislature."

Much reliance is placed on the case of *Home Telephone Co.* v. *City of Los Angeles, supra,* and it is thought that the court there held a doctrine sustaining the city in its contention here and contrary to our conclusion. The opinion of the trial court in that case is an able and exhaustive one; but a critical examination of that case, in both the trial court and in the Supreme Court of the United States, together with the statutes of the State of California, demonstrates that the legislature of that State, by an act known as the "Broughton Act" (Stats. of 1901, p. 265), had expressly delegated to municipalities the power to dispose of franchises, and that the manner so provided by the legislature had been followed by the city of Los Angeles. The city in that case was exercising an expressly delegated power and the case is in harmony with our conclusion, rather than opposed to it.

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The ordinance in question is legislative in character, so declared to be by its terms, and is so by its provisions. The city did not possess the power to enact it as a legislative, governmental measure, to be enforced by a proceeding penal in its nature, either by virtue of any power delegated to it in its charter or by force of the provision of the Constitution under consideration.

We have not before us, and do not pass upon, the question as to what rights municipalities may have under home rule charters, so-called; the city of Kalamazoo was here acting under a legislative charter.

The earnestness of counsel for plaintiff in their insistence that the construction claimed by them is the one indulged in by the framers of the present Constitution has prompted us to read the entire debates of the constitutional convention on this provision, and they cover many pages. The subject was considered on several occasions. We are unable to find the suggestion in these debates that this provision was designed to deprive the State of its governmental power to fix rates.

We are favored in the briefs of the respective parties with a discussion of the merits of two plans of delegating the power to fix rates for public utilities, one to a State public utility commission having general jurisdiction over all public utilities, the other direct to municipalities over those of local interest. We cannot determine this controversy. That is for the legislature. Both plans were submitted to the last session of the legislature (H. B. No. 7; File No. 11; S. B. No. 246, File No. 204; S. B. 247, File No. 205) and both failed of passage.

It follows that the writ of mandamus must be denied. As the question is a public one, no costs will be allowed.

BIRD, MOORE, STEERE, BROOKE, and STONE, JJ., concurred. OSTRANDER, C. J., and KUHN, J., did not sit.

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BOUDEMAN *v.* ARNOLD.

1. TRIAL—EVIDENCE—DIRECTED VERDICT.

Where the testimony is all one way, is uncontradicted by any testimony given in the case by the witnesses of either party, either on direct or cross-examination, or by any facts or circumstances in the case, is not in itself in any way improbable or discredited, and but one legitimate inference may be drawn from it, and a case is thereby made for the plaintiff or a defense made for the defendant, the duty rests upon the court to direct a verdict.

2. SAME.

That it is many times a difficult question to determine whether there is any testimony on a given subject, does not relieve the court from the responsibility or the duty of solving it.

3. SALES—CONDITIONAL SALES—RETAINING TITLE.

Title to personal property may be retained by parol in the vendor for security until paid for, even though a note is given to evidence the indebtedness; and the vendor may sue upon the note without losing his security.

4. TROVER AND CONVERSION—CONDITIONAL SALES—EVIDENCE — DIRECTED VERDICT.

In an action for the conversion of a marine engine, placed in a boat on which defendant had a chattel mortgage, after the giving of the mortgage, which did not cover after-acquired property, where plaintiff's demand for the engine was refused although it could have been removed without damage to the boat, and defendant sold and bid in the boat and engine, and the testimony is undisputed that title to the latter was retained in plaintiff, a verdict for plaintiff was properly directed by the court below.

Error to Berrien; Bridgman, J. Submitted January 8, 1918. (Docket No. 2.) Decided March 27, 1918.

Case by Dallas Boudeman, Jr., against Lester L. Arnold for the conversion of an engine. Judgment for

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plaintiff on a directed verdict. Defendant brings error. Affirmed.

O'Hara & O'Hara, for appellant.

Gore & Harvey (*Dallas Boudeman*, of counsel), for appellee.

FELLOWS, J. Prior to February 21, 1914, defendant was the owner of four passenger boats on Paw Paw Lake in Berrien county; one of these boats was named "Dixie". On this date he sold this line of boats to one Alpha Cross, taking as part payment certain real estate at an agreed price of $685, and receiving for the balance four promissory notes of $528.75 each, secured by a chattel mortgage on the boats; this chattel mortgage did not cover after-acquired property. Cross, after the purchase of the boats, made an arrangement with Harry W. Shively and a Mr. Corsett for the joint operation by the three of this line of boats during the season of 1914. Shively and Corsett were to and did put in five or six hundred dollars which was used to repair the boats and put them in shape for operation. The engine in the "Dixie" proved unsatisfactory and Shively saw plaintiff, a manufacturer of marine engines, with a view of purchasing one of his engines for use in the "Dixie". Both Shively and plaintiff testify to the arrangement made, which was that the engine should be tried out to see if it proved satisfactory, that title thereto should remain in plaintiff until paid for, and that a note was to be and was given as evidence of the indebtedness in case any of them should die. There was no testimony given to the contrary. The engine was shipped to Paw Paw Lake, put in the boat "Dixie" and worked satisfactorily. Shortly before the first note given by Cross to defendant fell due, defendant took possession of the boat "Dixie" and proceeded to advertise the same for sale under the terms of the mortgage. Plaintiff demanded

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the engine which the testimony shows could have been removed without damage to the boat, but the demand was refused and the boat with the engine installed was sold and bid in by defendant. This action was brought for the conversion of the engine. Upon the trial and here defendant conceded that title might be retained in personal property by parol, but insisted that it was a question for the jury in the instant case whether it was so retained. The trial court was of the opinion that plaintiff's case was made out by uncontroverted evidence, that there was no evidence to dispute it, and directed a verdict for the plaintiff for the value of the engine.

The defendant insists, and it is the only question in the case, that the court should have submitted the case to the jury.

The functions of judge and jury are too well understood to require extended discussion. The jury finds the facts, the judge decides the law. The jury weighs the evidence, the judge determines the legal questions. The credibility, sufficiency and weight of the evidence on a given subject are for the jury; the question of whether there is any evidence on a given subject is for the court Where the testimony is all one way, is uncontradicted by any testimony given in the case, either from a party's own witnesses, or the other party's witnesses, either on direct or drawn out on cross-examination, or by any facts or circumstances in the case, is not in itself in any way improbable or discredited, and but one legitimate inference may be drawn from it, and a case is thereby made for the plaintiff or a defense made for the defendant, the duty rests upon the court to direct a verdict. *Mynning* v. *Railroad Co.*, 64 Mich. 93; *Hunt* v. *Order of Chosen Friends*, 64 Mich. 671; *McGrath* v. *Railroad Co.*, 57 Mich. 555; *Peninsular Stove Co.* v. *Osmun*, 73 Mich. 570; *Brudin* v. *Inglis*, 121 Mich. 410; *Hicks* v. *Steel*, 126 Mich. 408; *Nester*

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v. *Township of Baraga*, 133 Mich. 640. That it is many times a difficult question to determine whether there is any testimony on a given subject, does not relieve the court from the responsibility or the duty of solving it.

In the instant case the testimony of plaintiff and Mr. Shively, a disinterested witness, agree as to what the arrangement was with reference to the engine; that title was retained in plaintiff until it was paid for, and that the note was given to evidence the indebtedness. We are unable to find anything in the cross-examination of either of them, any testimony by other witnesses, or any fact or circumstance in the case which in any way tends to discredit or controvert the facts testified to by them.

Under their undisputed testimony that title was retained in plaintiff, the circumstances surrounding their negotiations, their highly probable and in no way discredited testimony that the note was given solely to evidence the indebtedness, the fact that a note was given did not make a case for the jury. Title may be retained for security even though a note is given to evidence the indebtedness, and the vendor may sue upon the note without losing his security. *Holcomb & Hoke Manfg. Co.* v. *Cataldo*, 199 Mich. 265; *Atkinson* v. *Japink*, 186 Mich. 335.

Nor was a case made for the jury by the unsupported but often repeated claim of defendant's counsel, that the testimony of these witnesses was not truthful, and their version of the transaction was not true. If the unsupported claims of counsel would take a case to the jury there would be few cases that juries would not be given an opportunity to speculate upon. There was no error in refusing to submit this case to the jury and the judgment is affirmed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred.

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BARKER *v.* FINLEY.

1. EQUITY—APPEAL AND ERROR—DE NOVO.

On appeal in equity proceedings, the appellate court considers the case *de novo*, and where, after considering all the advantages of the trial judge, and the presumptions arising from the personal touch he had with the case, it is satisfied that an incorrect result has been reached, whether as a matter of law or fact, its duty to reverse the court below is clear.

2. EVIDENCE—FRAUD—PROMISES—CONTRACTS.

A promise made in bad faith, with no intent to carry it out, and as a part of a scheme to defraud, may be received in evidence because it is connected with representations of fact, and its nonperformance may be proven; but, standing alone, statements promissory in their character are contractual in their nature and do not constitute fraud.

3. SPECIFIC PERFORMANCE — LAND CONTRACTS — CONSIDERATION — EVIDENCE—EQUITY.

On a bill by the vendees for the specific performance of a land contract for the sale of a house and lot, where the evidence is undisputed that a $1,000 payment, credited on the contract at the date of the making, was never paid, and, as claimed by plaintiffs, was never intended to be paid, but which defendant claims was credited with the understanding that plaintiffs' father would pay it inside of two weeks; evidence as to the conflicting claims examined, and *held*, to preponderate in favor of plaintiffs and to require reversal of the decree for defendant in the court below.

Appeal from Calhoun; North, J. Submitted January 25, 1918. (Docket No. 107.) Decided March 27, 1918.

Bill by Shirley T. Barker and another against Agnes W. Finley for the specific performance of a land contract. Defendant filed an answer in the nature of a cross-bill asking for a reformation of the contract. From a decree dismissing the bill and granting the

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prayer of the cross-bill, plaintiffs appeal. Reversed, and decree entered for plaintiffs.

Verner W. Main (*George W. Mechem*, of counsel), for plaintiffs.

Stewart & Jacobs, for defendant.

FELLOWS, J. In the spring of 1910, Martin V. Barker and his wife, Harriet, the father and mother of plaintiffs, were occupying a house in the city of Battle Creek owned by one Lycurgus McCoy, spoken of in the record and briefs as Elder McCoy. Of their children, three at least were of age, Lincoln, Lulu, and Shirley. Lincoln was then a teacher in the high school at Battle Creek, Lulu was a nurse, and Shirley was attending college at Olivet. Mr. McCoy at that time owned two houses, the one then occupied by the Barkers, the other, the premises in question. He desired to remodel the one occupied by them for his own use, and to dispose of the other one. The facts preceding the execution of the papers are in dispute, but the documentary evidence shows that on May 23, 1910, Mr. McCoy executed to defendant a deed of the premises, and on May 25th she entered into a contract with Lincoln, Lulu, and Shirley Barker to sell them the premises on monthly payments. Later, and before the filing of this bill, Lincoln assigned his interest in this contract to his brother and sister. Early in the life of the contract the monthly payments were promptly made; later, not so promptly, but forfeiture was not declared. Mr. McCoy sold the premises to defendant for $4,000. The land contract recited $5,000 as the purchase price and payment of $1,000 was acknowledged therein by the defendant. Shortly before filing this bill plaintiffs made arrangements to pay the balance due on this contract and requested a statement of the amount due. A computation was furnished to which we shall refer

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later, and shortly thereafter they were informed of defendant's claim that she should insist on the payment of the $1,000 mentioned in the contract but which had not actually been paid. We are satisfied that this is the first information they had that defendant claimed the purchase price was actually $5,000, and that they owed $1,000 in addition to the amount provided for in the contract. They tendered the amount due on the contract according to its terms, and, upon its refusal, filed this bill for specific performance. Defendant answered and by way of cross-bill asked to reform the contract by striking out the acknowledgment of the receipt of the thousand dollars, on the grounds of fraud. The trial court dismissed the bill and granted defendant the relief prayed. Plaintiffs appeal.

We recognize, as contended by defendant, that the trial judge had the opportunity of seeing the witnesses, of noting their appearance on the stand, their candor, or want of candor, and that his conclusions as to the facts should be given due weight. No doubt this should be taken into consideration by the appellate court; but this court is considering the case *de novo*, and where, after considering all the advantages of the trial judge, and the presumptions arising from the personal touch he had with the case, we are satisfied that an incorrect result has been reached, whether as matter of law or of fact, our duty is clear.

In the instant case the preliminary question of fact is not in dispute. Both sides agree that the thousand dollars acknowledged down payment was not in fact paid. Plaintiffs contend that no other purchase price than $4,000, the price Mr. McCoy sold the place for, was ever considered or discussed by the parties; that defendant contemplated going to California and considered a contract more salable with a substantial down payment acknowledged, and that it would also aid them

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if they desired to sell the premises, and for these reasons the contract contained the provision it did. They deny that they authorized their father to act as their agent in the transaction, and insist that if there was any arrangement for a larger consideration than $4,000 it was without their authority, knowledge or consent. Defendant, on the other hand, contends that she bought this property for a speculation; that Martin V. Barker acted as agent for his children, and that he procured her to execute the contract containing the acknowledgment of payment through his fraudulent promise to, himself, pay the thousand dollars within a couple of weeks. This presents the controlling question in the case and around it the evidence, direct and circumstantial, revolves.

Mr. Barker appears to have possessed some of the traits of Dickens' famous character of Macawber; he appears to have been visionary, attempting various promotions, always expecting them to be successful, always looking for something to turn up, ready to borrow money; never realizing his ambitions, never successful, never discharging his obligations so far as defendant was concerned. At the time of this transaction she held a mortgage on the farm, which stood in Mrs. Barker's name, of $2,000 and unsecured obligations of Mr. Barker of over $2,000 more, all of which was long past due. Defendant in her testimony claims to have then had unbounded confidence in Mr. Barker, and to have accepted his unsecured promise to pay $1,000 in a couple of weeks' time. Her case on her cross-bill is sustained by her own testimony, and some inferences that are in the case, but which are not in any way conclusive, as we view the case. On the other hand, plaintiffs' testimony is strongly corroborated by members of the family and by disinterested witnesses, who, so far as the record discloses, are absolutely unbiased.

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Elder McCoy, who sold the property to defendant, and who had many conversations with her about its sale to the Barker children, was called as a witness for the plaintiffs. Under the circumstances of the case his testimony is of unusual importance. On direct examination he testified:

"*Q.* Did she tell you what she was selling to the Barkers for? What price?

"*A.* Why, I understood it was the same price that she paid me.

"*Q.* What was that price?

"*A.* $4,000."

Upon cross-examination he says:

"The question that particularly concerned Mrs. Finley that she came to talk with me about was if it would be advisable to sell to these parties, as they had no amount of money to pay down on the property, and it was stringing it out a long time, so she hesitated some time upon that question as to their ability or the advisability of selling to them on such a length of time. * * * I never heard that there was any dispute as to the consideration or any contention as to the matter, until this suit was brought."

In reply to a question by the court, he said:

"At the same time, Mrs. Finley seemed quite desirous of helping the family, and assisting them in any way she could, providing she was perfectly secure; her money would be out at interest and she would rely on it."

And upon re-examination he testified:

"Yes, she expressed herself as having sympathy for Mrs. Barker, that they had an interesting family and they now had a prospect or hoped to have a permanent home; they had been living in rented property for a long time and she said, 'Now you may think it is a foolish thing to do to sell them the property and give them a long time to pay for it, but I will be glad to do it if it can be safely done. I am willing to trust them for it.' I told her I thought it would be an ad-

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visable thing to do; I had confidence in the children that they would be active and industrious in making the payments."

This witness also testifies that in these conversations the defendant told him of Martin V. Barker's past-due obligations, her unsatisfactory dealings with him, and expressed herself freely that she did not think he would or could meet his contracts.

Mrs. Rowell, a confidential friend of defendant, gave testimony that defendant told her of this sale to the Barker children; that in the early conversations she stated the consideration to be $4,000, but in the later conversations had claimed an additional $1,000. She testified:

"In the early conversation she gave me to understand that—and so stated—it was $4,000. * * * In those former conversations, she did not say anything about the real consideration being more than $4,000. She made the statement to me that she thought she had sold the property too cheaply. During all of these former conversations she told me the purchase price was $4,000. She told me that she considered that too cheap. The time when she first spoke about the claimed $1,000 was less than 6 months ago. I couldn't just say how long it is. It was recently."

Plaintiffs' mother corroborated their claim, and Lincoln, who had assigned his interest in the contract to them and who therefore had no pecuniary interest in the case, testified unequivocally that the contract price was $4,000; that she stated that her dealings with his father had been unsatisfactory, that the children were more practical than he was, that she considered him very impractical and regretted that his mother at her age was not settled in a home where she could stay. Of this witness the court in his opinion said:

"I feel it my duty to place in the record in this case that Lincoln Barker, who appeared as a witness for the plaintiffs impressed me as being an honest and conscientious witness."

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But concluded that he was mistaken as to having had the conversations with defendant he testified he did have. All of this testimony was flatly contradicted by the defendant.

We have referred to a computation of the amount due on this contract obtained from defendant by plaintiffs prior to filing this bill. This computation was figured in accordance with the terms of the contract and did not include as due or owing the thousand dollars in controversy. The failure to include this sum is a significant fact and is explained by defendant with some plausibility. It is also significant that while defendant is now asking a reformation of the contract so as to collect the thousand dollars from these plaintiffs and out of this property, she stated to the man who made the computation that she was looking to Martin V. Barker for this sum.

A promise made in bad faith, with no intent to carry it out, and as a part of a scheme to defraud, may be received in evidence because it is connected with representations of fact, and its nonperformance may be proven. *McDonald* v. *Smith*, 139 Mich. 211, 218; but, standing alone, statements promissory in their character are contractual in their nature and do not constitute fraud. *Boston Piano & Music Co.* v. *Pontiac Clothing Co.*, 199 Mich. 141, and cases there cited. We doubt upon this record that we would be justified in finding that if Mr. Barker did make any promise to defendant to pay $1,000, it was made in bad faith, or that she relied upon it.

For over six years these plaintiffs have been making payments on this contract and have paid taxes, insurance, and repairs, with no notice or claim on the part of defendant that there was $1,000 more due on the contract than it showed upon its face. It was but shortly before this bill was filed that they had any knowledge of such claim. One defrauded must act promptly on

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discovering the fraud. If we should treat Mr. Barker's unfulfilled promise as a fraud, and concede all defendant claims for it, both as matter of fact and of law, still defendant knew within two weeks from the execution of the contract that it was not carried out, and for over six years she accepted payments and gave no notice to the plaintiffs of her claim that she had been defrauded, took no steps to have the contract reformed until brought into court as a defendant in a bill for specific performance. Equity requires vigilance, some degree of promptness upon the part of those claiming to have been defrauded; and especially is this true where innocent parties are dealing and assuming positions in reliance upon the validity of contracts.

The evidence in this case strongly preponderates in favor of the plaintiffs and the claim they assert. We are convinced that defendant purchased these premises of Mr. McCoy for the purpose of a resale to the Barker children; that she was prompted to do this by her kindly feelings, rather than a desire to speculate; that she was then satisfied with seven per cent. interest on the money invested; that, being assured the return of her money with interest, she was willing to assist these children in securing a home for their mother and themselves.

It follows that the decree of the court below must be reversed and one here entered in conformity with the prayer of the bill. Plaintiffs will recover costs of both courts.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, and STONE, JJ., concurred. KUHN, J., did not sit.

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BROWN *v.* CENTRAL WEST COAL CO.

MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—DEATH OF EMPLOYEE—COMPENSATION—BASIS OF AWARD.

Where the undisputed testimony showed that, after a workman had served his employer for several years in the capacity of a locomotive crane operator, he left its employ on June 21, 1916, going out on a strike, and on August 24, 1916, he re-entered its service in the capacity of a mechanic, under a new contract and at a different wage, in which capacity he was serving at the time of his accidental death, on October 1, 1916, the compensation awarded by the industrial accident board under the workmen's compensation law, was properly based upon his average daily wage during the time of his second employment, he not having worked in this employment "during substantially the whole of the year immediately preceding his injury." Act No. 10, Extra Session 1912, part 2, § 11 (2 Comp. Laws 1915, § 5441).

Certiorari to the Industrial Accident Board. Submitted January 11, 1918. (Docket No. 52.) Decided March 27, 1918.

Kate Brown presented her claim for compensation against the Central West Coal Company for the accidental death of her husband in defendant's employ. From an order awarding compensation, defendant and the Fidelity & Casualty Company, insurer, bring certiorari. Affirmed.

Guy W. Moore and *Hal P. Wilson,* for appellants.

Doyle & Barstow, for appellee.

The facts in this case are not in dispute. Liability is admitted. The sole litigated question is the amount of compensation to be paid. For several years prior to June 21, 1916, plaintiff's husband, the decedent, was continuously in the employ of defendant coal company

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as a locomotive crane operator. His average weekly wage during this period was $17.59. On that day decedent and other employees of the company went out on a strike. On August 24, 1916, he again entered the service of the company; this time as a mechanic. On October 1st, he met his death from an accident arising out of and in the course of his employment; his average weekly wage for the period from August 24th until his death was $20.14. The board awarded to plaintiff $10 per week for a period of 300 weeks. If the board was correct in computing the compensation on the basis of his average daily wage from August 24th to October 1st, the award should be affirmed, if not, it should be reduced to $8.79 per week. We quote briefly from the testimony of the secretary and treasurer of defendant coal company:

"*Q.* Mr. Gram, how do you denominate the character of service he was given. What name is given to his work?

"*A.* Mr. Brown is what we call a locomotive crane operator. Up to the time of the strike he held that position.

"*Q.* Did he go back to the same position after the strike?

"*A.* He took the position of mechanic at the rate of $90 per month.

"*Q.* And up to that time he was paid by the hour?

"*A.* Yes. * * *

"*Q.* When the men went back did they go back to the same places they left?

"*A.* I didn't say they got the same places; they went back regardless of what they did before."

FELLOWS, J. (*after stating the facts*). The section of the employer's liability act involved in this case is part 2, § 11 (2 Comp. Laws 1915, § 5441). In the case of *Andrejwski* v. *Wolverine Coal Co.*, 182 Mich. 298, this court had this section under consideration. Speaking through Chief Justice MCALVAY, it was there said:

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"By section 11 of part 2 of this act the legislature specifically provided the manner in which the average annual earnings of each employee should be determined by making four classifications, under one of which every case to be considered and determined under this statute must fall. Attention will now be given to these classifications, quoting and construing them in the order in which they appear in this section: * * *

"*Second.* 'If the injured employee has not worked in the employment in which he was working at the time of the accident, whether for the employer or not, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he has earned in such employment during the days when so employed'.

"This class is intended to include those cases where an employee who has not worked in the employment in which he was engaged at the time of his injury, whether for the same employer or not, during substantially the whole of the year immediately preceding his injury, where his daily wage or salary earned is fixed and known. In such case his average annual earnings will be 300 times such average daily wage or salary earned in such employment during the days when so employed."

In the case of *Robbins* v. *Engine Co.*, 191 Mich. 122, this court, speaking through Mr. Justice OSTRANDER, said:

"A man may change his employment or the capacity in which he follows it. If he has done so at a time substantially less than a year before his injury then the statute fixes 300 times his daily wages as his average annual wages."

When the decedent, a locomotive crane operator, left the employ of the coal company on the occasion of a strike, June 21st, the relations of master and servant, of employer and employee, were at an end. It required a new contract, a new employment, to restore such relations. When he entered the service of the coal com-

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pany as a mechanic on August 24th, it was under a new contract, a new employment; in a different capacity, at a different wage. It was in this new capacity, this new employment, that he was working when he met his death. He had not worked in this employment "during substantially the whole of the year immediately preceding his injury." In fact, he had so worked but a short time. It is clear, therefore, that the decedent belonged to the second class mentioned in the *Andrejwski Case*, and that compensation should be computed upon the basis of his average daily wage during the days when he was so employed. It was upon this basis that the award was made by the industrial accident board and such award is affirmed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred.

GRAY v. BROWN & SEHLER CO.

MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—ACTION AT LAW—ELECTION OF REMEDIES—RELEASE.

Where the widow of a deceased employee filed a claim under the workmen's compensation act with the employer, who was subject to its provisions, such action operated as a release of the employer from all claims and demands at law (section 1, part 6, Act No. 10, Extra Session 1912, 2 Comp. Laws 1915, § 5488), and where an action was brought, based on the employer's common-law liability, the court below properly directed a verdict for the defendant.

Error to Kent; Brown, J. Submitted January 31, 1918. (Docket No. 183.) Decided March 27, 1918.

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Case by Thomas Gray, administrator of the estate of Morton B. Jameson, deceased, against Brown & Sehler Company for the negligent killing of plaintiff's intestate. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Maynard, Freeland & Munshaw, for appellant.

Roland J. Cleland (*Earl F. Phelps*, of counsel), for appellee.

FELLOWS, J. This action at law is brought under the "Death Act" to recover damages for the negligent killing of a workman who met his death by the falling of the walls of defendant's plant, which had been destroyed by fire. The same accident occasioned the case of *Opitz* v. *Hoertz*, 194 Mich. 626, which came to this court on certiorari to the industrial accident board. In that case the question of liability for compensation was not disputed, the contested question being which defendant was liable. In the instant case plaintiff seeks to recover damages under a declaration counting on defendant's negligence. At the close of the case defendant moved for a directed verdict upon three grounds, which, briefly stated, were:

(1) The parties were operating under the workmen's compensation law and proceedings must be had under that law.

(2) Decedent's widow and dependent had filed claim for compensation under that act, which fact barred an action at law and required that compensation be received under its provisions.

(3) The proof did not show instantaneous death.

The court directed a verdict on the first of these grounds.

We find it unnecessary to discuss the reasons given by the learned circuit judge for his action as we are clearly of opinion that defendant must prevail on the

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second ground of the motion. After bringing this suit the widow and dependent, by her attorneys, filed with the industrial accident board and served on defendant, a formal claim for compensation under the provisions of Act No. 10, Extra Session 1912 (2 Comp. Laws 1915, § 5423 *et seq.*). There is no claim that any mistake as to her remedy caused her to do this. It was done by her attorney, and we must assume it was deliberately done; it is dated but a few days before the six months' limit of the statute had expired.

Upon the trial defendant admitted its liability under the act and offered to pay compensation according to its provisions. We therefore have this situation presented: The dependent deliberately makes claim for compensation under the terms of the workmen's compensation act; the employer admits liability. The act itself provides, section 1, part 6 (2 Comp. Laws 1915, § 5488):

"If the employee, or his dependents, in case of his death, of any employer subject to the provisions of this act files any claim with, or accepts any payment from such employer, or any insurance company carrying such risks, or from the commissioner of insurance on account of personal injury, or makes any agreement, or submits any question to arbitration under this act, such action shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury."

This section makes the filing of a claim a "release" of "all claims and demands at law," and is one of the essential features of the act This court and other courts of last resort have so frequently commented on the purposes of this act and similar legislation in other States, that it is unnecessary to here repeat what has so often been said, further than to say, that among its purposes was the elimination of expense and delays growing out of litigation between employees and em-

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ployers, a purpose which could be easily frustrated by permitting employees to bring litigation based upon common law liability, while at the same time holding fast to the statutory right to compensation. This the legislature clearly sought to prevent by this section. It is patent that the legislature contemplated that parties should not be permitted to play fast and loose with this meritorious legislation; that the legislature clearly had this in mind when this provision was incorporated in the act. The language is clear and unequivocal, and, therefore, not open to construction.

We repeat that we have not before us the question of a mistaken election of remedy; nor have we before us the question of an employee engaged in interstate commerce, as was the case of *Waters* v. *Guile*, 234 Fed. 532, and kindred cases, where it is held that congress, acting under the commerce clause of the Federal Constitution, has occupied the field, and the Federal employers' liability act of April 22, 1908, affords the sole and exclusive remedy for injuries received, a doctrine which was accepted by this court in *Carey* v. *Railway Co.*, *ante*, 12. But the doctrine of these cases is based on the theory that congress, having legislated upon a subject committed to it, has, thereby, excluded the State from legislation on the same subject, and that, therefore, the State legislation must fail when sought to be applied to employees engaged in interstate commerce. But here we are dealing with a Michigan employer and a Michigan employee and a Michigan statute enacted within the scope of the power of the Michigan legislature. By its express terms the employer is released from liability in a suit at law by the filing of a claim for compensation under this act. The dependent of decedent having claimed compensation under the act, and the employer, defendant here, having admitted liability and offered to pay compensation under its provisions, nothing remains except to

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determine the amount of such compensation. This must be done under the provisions of the act. An action at law is not maintainable and a verdict for defendant was properly directed.

The judgment must be affirmed.

BIRD, MOORE, STEERE, BROOKE, and STONE, JJ., concurred. OSTRANDER, C. J., and KUHN, J., did not sit.

In re TELLER'S ESTATE.

1. ESTATES OF DECEDENTS—CLAIMS—SERVICES RENDERED—PARENT AND CHILD—PRESUMPTIONS.

   While it is the settled law of Michigan that services performed by a child for a parent are presumptively performed gratuitously, the presumption may be rebutted by evidence that both parent and child acted upon the understanding that the services were to be paid for.

2. SAME—IMPLIED CONTRACT—QUESTION FOR JURY.

   In an action by a son against the estate of his mother for services performed under an arrangement with her that he was to be paid out of the estate, evidence *held*, sufficient to raise a question of fact for the jury.

3. SAME—RELEASE—SETTLEMENT.

   A receipt from the son to the mother expressing a nominal consideration "in full of all demands, accounts, actions, or causes of action whatsoever, to and including this date," is not a settlement conclusively binding upon claimant, where the evidence shows that a similar contemplated receipt to be signed by the mother was not signed, that there was no going over of accounts, or a determination of balances, or a payment of any money by either to the other.

4. FRAUD—ESTOPPEL.

   It is a well understood rule, based upon general principles

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of public policy, that courts will not extricate parties from a situation in which, by their own acts, they have placed themselves in perpetrating, or attempting to perpetrate, a fraud on others; that, if fraudulent contracts are executed, courts may not be appealed to to work a restoration of the property, and, if executory, they will not lend their aid to work an enforcement.

5. ESTATES OF DECEDENTS—RELEASE — FRAUD — ESTOPPEL — QUESTION FOR JURY.

Where there was testimony that the mother stated that the receipt was given to her for the purpose of defrauding claimant's wife, but claimant's participation in the fraud, if any, was not conclusively shown, the trial court was not in error in refusing to direct a verdict on the ground that claimant was estopped to dispute the receipt on the ground of fraud; but the court's refusal to submit the question to the jury, as he was requested by appropriate requests to do, constituted reversible error.

Error to Livingston; Miner, J. Submitted January 16, 1918. (Docket No. 13.) Decided March 27, 1918.

John Teller presented a claim against the estate of Eliza Teller, deceased, for services rendered. The claim was allowed in the probate court, and Ella Madden, an heir, appealed to the circuit court. Judgment for claimant. Contestant brings error. Reversed.

Roy D. Matthews and *Edmund C. Shields,* for appellant.

Louis E. Howlett and *W. P. Van Winkle & Son,* for appellee.

FELLOWS, J. John Teller filed this claim against the estate of Eliza Teller, deceased, for services performed in the conduct of her farm in Cohoctah township, Livingston county, during the years 1890 to 1899. Deceased was the mother of claimant. It is his claim that he reached his majority during the year 1890 and remained with her on the farm for nine years

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under an arrangement that he was to be compensated when she was able so to do, and if he was not paid before her death he should be compensated out of her estate. He obtained a verdict and had judgment thereon at the circuit in the sum of $1,400.

It is first urged as grounds for the reversal of this judgment that the court should have directed a verdict against the claimant because no contract was proved between him and deceased, warranting the submission of that question to the jury. It is the settled law of this State that services performed by a child for the parent are presumptively performed gratuitously, that they are performed in the line of filial duty and compensation cannot be recovered by proof alone of the services and their value. *Wright* v. *Senn's Estate,* 85 Mich. 191; *Boughton* v. *Boughton's Estate,* 111 Mich. 26; *Harris* v. *Harris,* 106 Mich. 246; but it is equally the settled law of this State that in this class of cases it is not necessary to establish that at a given time before the services were rendered a formal contract was entered into by the parent and child, for the payment on the one hand and performance of the services on the other, and it will be sufficient if the evidence establishes that both parent and child acted upon the understanding that the services were to be paid for. Where both parties understood and expected that the services are to be paid for the presumption above adverted to is rebutted. *Sammon* v. *Wood,* 107 Mich. 506; *Ashley* v. *Smith's Estate,* 152 Mich. 197; *In re Abel's Estate,* 173 Mich. 93; *Maynard* v. *Schrumpf's Estate,* 192 Mich. 494; *Galloway* v. *Scully,* 199 Mich. 181. Without detailing the testimony it will be sufficient to say that the testimony of witnesses, who claimed to have talked with deceased in her lifetime, her relatives and neighbors, made a case for the jury within the cases last above cited.

On September 25, 1900, and after the services here

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involved had all been performed plaintiff signed and delivered to the deceased the following paper:

"COHOCTAH, Sept. 25, 1900.

"Received of Eliza Teller, one dollar in full of all demands, accounts, actions or causes of action whatsoever, to and including this date.

"JOHN TELLER."

It appears from the testimony that Mrs. Teller prior to this day had caused this receipt, with the date left blank, to be prepared by a justice of the peace, together with a receipt of similar purport from herself to claimant. The testimony of those present when this receipt was signed was to the effect that it was signed at her request, and that she offered to execute the similar paper to claimant, but that he told her he did not want it, and that it was understood that all accounts between them were settled and that claimant had no claim against his mother. To meet this testimony, and it was done in making out the case in chief, claimant's counsel in his opening statement to the jury having admitted the execution of this receipt, there was offered and received in evidence the testimony of witnesses tending to show that deceased, after the execution of this paper, admitted her indebtedness to claimant; the testimony of two witnesses was also given to the effect that they had conversations with deceased shortly before this date in which she expressed herself as apprehensive of trouble from claimant's wife, Maggie, in case claimant should die before she did. They state that they advised her to take a receipt from John. On cross-examination they say, in response to questions asked by defendant's counsel, that they so advised and the receipt was given to beat claimant's wife, Maggie.

Counsel for the estate, while not controverting the rule that a receipt may be disputed, insists that this was something more than a receipt, and that it is con-

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clusively established that a settlement of all matters between claimant and deceased was had which could only be set aside for fraud or mistake. It is pointed out that mutual receipts were prepared and that the language found in the receipt in question: "in full of all demands, accounts, actions or causes of action whatsoever, to and including this date," taken in connection with the other paper prepared for Mrs. Teller to sign, conclusively shows a settlement and that the court should have directed a verdict for the estate for this reason. We cannot follow counsel in this contention. Mrs. Teller did not execute the receipt to claimant, there was at this time no going over accounts, or a determination of balances or a payment of any money by either to the other. We think the case on this question is controlled by *Van Slambrook* v. *Little's Estate,* 127 Mich. 61, a case not unlike this one, except that the question of public policy, to which we shall now give attention, was not there raised.

It is a well understood rule that courts will not extricate parties from a situation in which, by their own acts, they have placed themselves in perpetrating or attempting to perpetrate a fraud on others. This is based upon no tenderness for the other party to the fraudulent transaction but is founded upon general principles of public policy. It sounds ill in the mouth of the party engaged in the perpetration of a fraud to claim that the transaction was immoral and fraudulent; courts will leave the parties engaged in such fraudulent transactions where they have placed themselves. If their fraudulent contracts are executed courts may not be appealed to to work a restoration of their property; if their contracts are executory courts will not lend their aid to work their enforcement. *Knight* v. *Linzey,* 80 Mich. 396; *Williams* v. *Clink,* 90 Mich. 297; *Stoney Creek Woolen Co.* v. *Smalley,* 111 Mich. 321; *Bryant* v. *Wilcox,* 137 Mich. 669.

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It was well said by Mr. Justice Spofford, speaking for the supreme court of Louisiana, in the case of *Boatner* v. *Yarborough*, 12 La. Ann. 249:

"But judicial tribunals should not be called upon to adjust the balance of profit and loss between joint adventurers in iniquity. No action lies for the price of fraud. The law, whose mission is to right the innocent and to enforce the performance of licit obligations only, leaves parties who traffic in forbidden things and then break faith with [each] other, to such mutual redress as their own standard of honor may award."

If the claimant and his mother, for the purpose of working a fraud upon claimant's wife, Maggie, entered into a scheme or arrangement, whereby the paper above referred to was executed for the purpose of furnishing fraudulent evidence of a settlement between them, it does not lie in the mouth of claimant to assert such fraud for the purpose of defeating the receipt. He must accept the situation in which he, by his fraudulent conduct, placed himself.

At the close of claimant's proofs and again at the close of the case counsel for the estate moved for a directed verdict for the reason, in addition to those already disposed of, that the undisputed testimony showed that the receipt was given for the purpose of committing a fraud on claimant's wife, Maggie. These motions were overruled and error is assigned thereon. Upon a motion for a directed verdict the testimony most favorable to the opposite party must be taken as true and the legitimate inferences to be drawn therefrom most favorable to his case must be permitted. While it is true that the two witnesses heretofore referred to testified on cross-examination to their advice to deceased to have claimant execute the receipt for the purpose of defrauding claimant's wife, and it may be legitimately inferred from the testimony in the case that claimant participated in such fraudulent purpose,

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still we are impressed, upon a consideration of all their testimony, together with the other testimony in the case, that it is not conclusively established that claimant did participate in such fraudulent purpose, or that the purpose of giving the receipt was not to relieve her from worry. The court did not err in refusing to direct a verdict for the estate for this reason, but he should have submitted this question to the jury. This he refused to do, although appropriate requests were submitted. It was reversible error not to give these requests or the substance of them.

Aside from the subject last referred to, the charge fully protected the rights of the estate. We have examined the other errors assigned; they are not likely to arise on a new trial and we do not find it necessary to discuss them. For the error pointed out the case must be reversed and a new trial granted, with costs of this court to appellants.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred.

GLEASON *v.* STONE.

1. TRIAL—PRINCIPAL AND AGENT—ISSUE—QUESTION FOR JURY.
   Where plaintiff brought suit to recover a balance of rent claimed to be owing to him by defendants, sublessees of another, conflicting testimony as to whether he was acting as principal or as agent of the lessee in the arrangement made with defendants to pay additional rent, presented a question of fact for the jury.

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2. SAME—EVIDENCE—LANDLORD AND TENANT—RELEASE—PRINCIPAL AND AGENT.

In such action, evidence sustaining the theory of defendants that they dealt with plaintiff as agent of the lessee, and that the latter subsequently agreed to take care of the indebtedness for which suit was brought, was admissible.

3. SAME—ESTOPPEL—INSTRUCTIONS.

An instruction that, if defendants agreed to pay the last month's rent, and in reliance thereon plaintiff paid it, that there would be a sufficient consideration for the promise, and defendants would be estopped to deny liability, fully protected the rights of plaintiff.

4. APPEAL AND ERROR—REVIEW.

Where there was no request to charge on the question of sufficiency of tender in the justice's court, and nothing in the record to show that the attention of the trial court was directed to the question, it is not before the Supreme Court for review, although discussed in counsel's brief.

5. TRIAL—APPEAL AND ERROR—NEW TRIAL.

Where the evidence was in sharp conflict on the material questions, the trial court did not err in refusing to direct a verdict for plaintiff, or in refusing his motion for a new trial on the ground that the verdict was against the weight of the evidence.

Error to Kent; Cross, J., presiding. Submitted January 30, 1918. (Docket No. 82.) Decided March 27, 1918.

Assumpsit in justice's court by Clark H. Gleason against Clifton G. Stone and others for rent. There was judgment for plaintiff, and defendants appealed to the circuit court. Judgment for defendants. Plaintiff brings error. Affirmed.

Gleason & Lee (*Myron H. Walker*, of counsel), for appellant.

Rodgers & Rodgers, for appellees.

One Henry Steinbrecher held a lease on certain property in Grand Rapids, consisting of two stores on the

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ground floor and rooms on the second floor above them. The monthly rental was $125. The second floor was occupied by Steinbrecher for a tailoring establishment. One of the stores was sublet by him to a barber at $55 per month, the other to defendants at $65 per month. Steinbrecher seems to have been dissipated and went away for treatment for his habit, leaving his sons in charge of the business. They possessed some of their father's failings and Mrs. Steinbrecher grew apprehensive that the rent would not be paid so that the business could be kept going during her husband's absence. She saw the plaintiff, an attorney who had done some business for her husband, with reference to the situation. She also sent to the plaintiff a desirable tenant for the store occupied by the barber who was behind in his rent. The parties, so far as the record discloses, seem to be in accord to this point. As to subsequent points they disagree. It is the claim of the plaintiff that he took upon himself, as a matter of friendship for Mr. Steinbrecher, the arrangement of the matter so as to insure for the sublessees their continuance of possession and the collection of sufficient money from them to pay the $125 per month to Steinbrecher's landlord; that to do this he leased the store occupied by the barber to a new tenant at $57.50 per month and made an agreement with defendants that they should pay $67.50 per month for the balance of their term, thus insuring the nonforfeiture of the lease. It is his claim that defendants paid their monthly rent until the last month, when they, after repeated promises to pay the $67.50, tendered him the balance which would be due at $65 per month, and demanded a receipt. He refused this tender and brought this suit in justice's court. The defendants claim that they did not make an agreement with plaintiff to pay additional rent; that plaintiff called upon them claiming to represent Steinbrecher; that he did

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ask for an increase of their rent by $2.50 per month; that he told them if the additional rent was not paid their lease would lapse and they would be put out; that they paid the additional rent demanded under protest, and with the statement from them that they would see Steinbrecher on his return and arrange with him; that on his return they did arrange with him that they should continue to pay plaintiff the amount demanded by him, and that he, Steinbrecher, then stated that he was down and out, but as soon as he got straightened away he would take care of it before the end of the lease; that not having done so, they tendered the balance due in accordance with the terms of their lease. Defendants had verdict and judgment upon the trial at the circuit upon appeal, and plaintiff brings the case here.

FELLOWS, J. (*after stating the facts*). If plaintiff, in making the arrangements with defendants, whatever they were, was acting solely as agent for Steinbrecher, and this was a question for the jury, then defendants were not prevented from dealing directly with his principal. It was the claim of plaintiff that defendants paid to him $67.50 per month rent because of an agreement with him individually to that effect. It was defendants' claim that such payments were made pursuant to an agreement with plaintiff's principal. It was not error for the court to admit testimony offered by defendants to sustain their claim, they having already given evidence making the question of plaintiff's agency one for the jury. Defendants' claim was not for an offset, but that they had paid and tendered the full amount due on their lease and agreement with plaintiff's principal. The court committed no error in admitting evidence of what this agreement was.

It was the claim of plaintiff that he paid the last month's rent in reliance on defendants' agreement to

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pay the full $67.50 rent for that month and that the doctrine of estoppel should protect him in such payment. But defendants' testimony, as we have already stated, tended to disprove this. The court instructed the jury:

"If you find by a preponderance of the evidence that in June, 1916, when the last month's rent was due, the defendants, one or more of them, promised the plaintiff to pay the rent for that month to him, knowing that he was to pay the amount to the owner, and if you find that, relying upon that promise, plaintiff did pay the amount of $67.50 for defendants as a part of the $125.00 payment to the owners substantially as testified by the plaintiff, then I charge you plaintiff would be entitled to recover.

"In that event there would be a sufficient consideration for the promise and defendants, after such payment by plaintiff under such an agreement, would be estopped to deny liability to pay plaintiff the amount so paid by him."

This instruction as fully protected the right of the plaintiff as the state of the evidence would permit.

It is stated in the brief of appellant, that the tender in justice's court did not include the costs and an interesting discussion follows as to the effect of the tender before suit brought accompanied by a demand for a receipt. But the record does not show very extensively the proceedings in justice's court, or the amount of the tender; it does show, however, an offer by defendants' counsel to be sworn on the trial at the circuit on the subject, and a statement by plaintiff's counsel that he would take his word for it. We are pointed to no request to charge on the subject, or to any place in the record where the attention of the trial court was directed to the question of tender; nor are we able to find it. It is only necessary for us to say that the question is not before us.

There was a sharp conflict in the evidence on the material questions in the case and the court did not err

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in refusing to direct a verdict for the plaintiff, or in refusing his motion for a new trial on the ground that the verdict was against the weight of the evidence.

We have examined the other errors assigned and find them without merit.

The judgment is affirmed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred.

COOKE *v.* HOLLAND FURNACE CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—LIMITATION OF ACTION.

   The limitation provided in sections 15 and 4, part 2, of the workmen's compensation act (sections 5445, 5434, 2 Comp. Laws 1915), begins to run from the date of the accident, and not from the time of disability.

2. SAME — WORDS AND PHRASES — "INJURY" — CONSTRUCTION OF STATUTE—INTENT.

   The word "injury," as used in said sections, having acquired in the law a well-defined and well understood meaning, it must be *held*, to have been used by the legislature as it was commonly understood, in the absence of a special definition in the act.

3. SAME—CLAIM FOR COMPENSATION—MEDICAL SERVICES—LIMITATION.

   Where claimant was injured, while in defendant's employ, by a falling bolt striking him on the head, and, after first aid by the foreman, he continued at work for nearly a year, when serious disability developed as a result of the accident, requiring an operation on the skull, and claim for compensation was not served on the employer until after the operation, although it had knowledge of the

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accident by its foreman and superintendent, an award of compensation and for medical and hospital services by the industrial accident board, under the workmen's compensation law, was unauthorized, the claim not having been made within the time limited in sections 15 and 4, part 2, of said act.

4. SAME—"ACCIDENT"—"INJURY."

While the words "accident" and "injury" are not synonymous, the accident produced the injury, and in point of time they are concurrent.

Certiorari to Industrial Accident Board. Submitted January 15, 1918. (Docket No. 72.) Decided March 27, 1918.

Fred H. Cooke presented his claim for compensation against the Holland Furnace Company for injuries received in defendant's employ. From an order awarding compensation, defendant and the General Accident, Fire & Life Assurance Corporation, insurer, bring certiorari. Reversed, and order vacated.

Kerr & Lacey, for appellants.

Ellis & Ellis, for appellee.

The facts in this case are not in dispute, and, briefly stated, are as follows: Plaintiff for several years prior to October, 1915, was in the employ of the Holland Furnace Company. On or about the 6th of that month while at work in the foundry of that company a bolt from an overhead track fell and struck him on the head. The wound bled profusely. He was given first aid by the foreman and the wound washed out with peroxide. He continued to work until August following, when he laid off for a couple of weeks. Commencing in December following the accident he had headaches, sleepiness, and was dizzy, and a lump appeared on his head where the bolt struck him. This condition caused him to lay off the two weeks in August.

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After he resumed his work in August he worked until September 14th, following. The 17th or 18th of September plaintiff had an X-ray made, and the latter part of September or first of October, an operation was performed which revealed a fracture of the skull and a softening of the bone, with an accumulation of pus underneath necessitating the removal of the diseased bone, and trepanning the skull. Plaintiff resumed his work November 14th. Claim for compensation was served on the Holland Furnace Company October 9, 1916. The record discloses that defendant, by its foreman and superintendent, had knowledge of the accident, but it also discloses that no claim for compensation was made until the formal one of October 9th. From an award for compensation for 8-4/7 weeks and for medical and hospital services, the defendant comes to this court by writ of certiorari.

FELLOWS, J. (*after stating the facts*). The plaintiff insists, in support of this award, that the "injury" did not occur until disability took place, or, to use the language of the board in its findings:

"At the time he became definitely satisfied that the disability he was suffering was the result of the accident."

The defendant, on the other hand, insists that the "injury" to plaintiff occurred when the accident happened; that at that time plaintiff received the "injury" within the meaning of the act, and that the disability later obtaining, and the seriousness of the conditions, were the results of the injury then inflicted. The provisions of the employer's liability law here involved are sections 15 and 4, of part 2 (sections 5445, 5434, 2 Comp. Laws 1915). They are as follows:

"SEC. 15. No proceedings for compensation for an injury under this act shall be maintained, unless a notice of the injury shall have been given to the employer three months after the happening thereof, and

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unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same; or, in case of the death of the employee, or in the event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity."

"SEC. 4. During the first three weeks after the injury the employer shall furnish, or cause to be furnished, reasonable medical and hospital services and medicines when they are needed."

At the present term four other cases involving the question here under consideration were submitted, and we have had the benefit, not only of the argument made and briefs filed in this case, but also the arguments and briefs in the other cases. The importance of the question has also called for independent research.

We are not here dealing with the question of the sufficiency of notice, or claim, as we were in the cases of *Matwiczuk* v. *Foundry Co.*, 189 Mich. 449; *Shafer* v. *Parke, Davis & Co.*, 192 Mich. 577; and *Purdy* v. *City of Sault Ste. Marie*, 188 Mich. 573. Therefore the cases of *Ridgeway* v. *City of Escanaba*, 154 Mich. 68, and *Pearll* v. *City of Bay City*, 174 Mich. 643, do not apply. See *Van Auken* v. *City of Adrian*, 135 Mich. 534; *Holtham* v. *City of Detroit*, 136 Mich. 17.

We are confronted for the first time with the question of whether the statute begins to run from the date of disability (or ascertainment and definite satisfaction that disability exists), or from the date of the accident. We must approach this question, having full regard for the fact that under the division of powers found in the Constitution, our duty is not to enact but to expound the law, not to legislate but to construe legislation; to apply the law as we find it, to maintain its integrity as it has been written by a co-ordinate branch of the State government. If the law as written works hardships in a special class of cases the remedy lies with the branch of the government charged with

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the duty of enacting laws. If one does not protect himself and his rights under the law as written it is his misfortune, and this court should not, by judicial legislation, for the purpose of relieving that misfortune, write into the statute a provision that the legislature has not seen fit to enact. During the course of an opinion worthy of careful perusal and consideration, it was said by Mr. Justice Marshall, speaking for the supreme court of Wisconsin, in *City of Milwaukee* v. *Miller*, 154 Wis. 652, a case involving the workmen's compensation law of that State:

"That is his misfortune and, however much it may be regretted, it is far better that the integrity of the law be not invaded than that it be impaired in the slightest degree in the particular instance to avoid the consequence of his not knowing or appreciating its requirements."

Prior to legislation of this character courts had to deal with statutes of limitation having relation to common law or statutory actions for negligence, and the holdings of the courts were in harmony that the injury occurred, and the statute began to run on the happening of the negligent act. Thus it was held by the supreme court of Iowa, in the case of *Gustin* v. *County of Jefferson*, 15 Iowa, 158. We quote the syllabus:

"The statute of limitations as to actions for damages resulting from injuries to the person, commences to run from the time the injury is done, and not from the time the party injured becomes fully advised of the extent thereof."

In the case of *Leroy* v. *City of Springfield*, 81 Ill. 114, it was said:

"Appellant asks, when shall it be said the cause of action arose, as, in many cases, the extent of the injury cannot be known for a long time?

"The principle, we understand, is, that the cause of action arises at the time the injury was done, and the statute begins to run from that day."

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In *Atchison, etc., R. Co.* v. *King*, 31 Kan. 708, it was held by the court:

"The liability of the railroad company for the injury complained of accrued when the accident occurred."

In *Piller* v. *Railroad Co.*, 52 Cal. 42, it was held, we quote the syllabus:

"The liability of a railroad company for damages for an injury done to a passenger by collision of its cars, accrues when the collision occurs, and the action must be brought within two years from such time."

In *Mardis* v. *Shackleford*, 4 Ala. 493, it was said by the court:

"In respect to the statute of limitations, it may be regarded as settled law, that it began to run from the time the intestate was chargeable with negligence; for then a right of action accrued in favor of the plaintiff."

In *Crawford* v. *Gaulden*, 33 Ga. 173, Mr. Justice Jenkins, speaking for the court, said:

"The doctrine is well settled that in an action against an agent for negligence or unskillfulness, the statute of limitations commences to run from the time the negligence or unskillful act was committed, and plaintiff's ignorance of the negligence or unskillfulness cannot affect the bar of the statute."

See, also, the following cases: *Fowlkes* v. *Railroad Co.*, 56 Tenn. 829; *Taylor* v. *Railroad Co.*, 53 Hun (N. Y.), 305; *Wilcox* v. *Executors of Plummer*, 4 Pet. (U. S.) 172; *Bank of Utica* v. *Childs*, 6 Cow. (N. Y.) 238; *The Governor* v. *Gordon*, 15 Ala. 72.

At the time of the enactment of this legislation the word "injury" had acquired in the law a well defined and well understood meaning; indeed counsel for plaintiff in the instant case frankly states:

"There must necessarily be a new definition of the word "injury" to embrace the circumstances that arise under the workmen's compensation law."

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But the difficulty with this suggestion lies in the fact that the legislature did not use this word in the act in question with the view of some new definition which this court or an administrative body might later see fit to coin. It was used in the act as it was commonly understood at the time. Our legislature did not see fit to give it a special definition as did the legislature of Nebraska, as we shall presently see.

The two cases most strongly relied upon by the plaintiffs in these cases are *Johansen* v. *Union Stock Yards Co.*, 99 Neb. 328, and *In re McCaskey* (Ind. App.), 117 N. E. 268. An examination of the Nebraska act discloses that both the words "accident" and "injury" were defined by the act itself: Section 3693-*b* Rev. Stat. 1913. This section reads in part as follows:

"The word 'accident' as used in this article shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event, happening suddenly and violently, with or without human fault and producing at the time objective symptoms of an injury. The terms 'injury' and 'personal injuries' shall mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom." * * *

By this statutory definition of the word "injury" the *result* of violence to the physical structure of the body was included within the meaning of the word, and it necessarily followed that, under the statute, the result of the accident was the injury. If those results were delayed the injury was delayed. But this is purely statutory, and is convincing that the legislature of that State had in mind the making of a statutory definition of the word not in accordance with its generally accepted meaning. This case was followed by the Nebraska court in the case of *Simon* v. *Cathroe Co.*, 101 Neb. 211 (162 N. W. 633), a case which we were asked to follow in *Armstrong* v. *Pickle Co.*, 197 Mich. 334. This suggestion we declined because of the differences

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in the statutes and in the facts of the two cases. The *Indiana Case* is from the appellate court, division No. 1, and involves the question of payment for medical services. The court for its authority relies upon a holding of the Connecticut commission, the holding of the Michigan commission (*In re Hart*, Mich. W. C. C. 338, a case similar to the instant case), upon two Massachusetts cases (*Johnson's Case*, 217 Mass. 388, and *Hurle's Case*, 217 Mass. 223), and 1 Honnold on Workmen's Compensation, § 198. In *Hurle's Case* the question of notice or claim was not involved. The workman in that case had suffered an acute attack of optic neuritis incurred in the performance of his usual duties in the usual way. It was held that the employer was liable. Not only was it an occupational disease case, but it also is not in accord otherwise with the holding of this court in *Kutschmar* v. *Manufacturing Co.*, 197 Mich. 146. In *Johnson's Case* the question of an occupational disease was also involved. This case is likewise not in accord with the holding of this court in *Adams* v. *Color Works*, 182 Mich. 157, in which Mr. Justice STONE, speaking for the unanimous court, fully considered these two Massachusetts cases, and says:

"As 'accident' is the controlling word in our act, we do not think that the Massachusetts decision should be held to apply here, as the construction of that act has little, if any, bearing on the Michigan act."

He then proceeds to carefully consider the provisions of the Massachusetts act and distinguished it from our act. It is unnecessary for us to repeat here what was there so fully considered. Obviously the Massachusetts cases cannot be regarded as persuasive here.

In section 198, 1 Honnold on Workmen's Compensation, we find the following, and it is all that appears in that section of importance here:

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"The Michigan limit is 3 weeks, commencing when it is first needed."

To support this text the decision of the industrial accident board in *Re Hart,* above mentioned, is alone cited. We are not impressed that we should follow the holding of the Indiana court.

In the case of *Podkastelnea* v. *Railroad Co.,* 198 Mich. 321, this court had under consideration one of the sections here involved, section 15. We there pointed out some of the purposes of the limitations found in this section, quoted the provisions of the English act, called attention to the fact that the legislatures of some of our sister States have adopted similar provisions, and stated:

"The legislature of this State has not seen fit to do so. If the provisions of our act are not sufficiently liberal as to making claims for compensation, the question is one for the legislative branch, not for the judicial."

We there reversed the award of the board on the ground that the claim for compensation was not seasonably filed and that the delay was not excused by the fact that the claimant was unable to personally make out and personally mail or deliver the claim.

In the case of *Armstrong* v. *Pickle Co., supra,* this court gave effect to the limitations found in this section and set aside the award of the board.

In *Ehrhart* v. *Industrial Accident Commission,* 172 Cal. 621, the supreme court of California said:

"It was not, we believe, the intention of the lawmakers to open the statute of limitations and to extend it beyond the period of six months for the purpose of enabling a claimant to present an entirely new case based upon the alleged results of an injury which had never before been called to the attention of the commissioners. To hold otherwise would be to make the statute an instrument for the encouragement of false claims or those based upon remote and unsatisfactory

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speculation and peradventure regarding the cause of a disability manifesting itself long after the happening of the accident. One of the purposes of the time limit imposed by the various subdivisions of section 16 was to cause an early submission to the commissioners of the injuries to the employee, so that the commissioners by their own observation and with the aid of expert testimony might determine, not only the condition of the applicant at that time, but the probable future results of the accident. This policy is manifest from the fact that where no disability has occurred at the time of the hearing, but is likely to do so in the future, the commission may retain jurisdiction. (Section 25 [*c*].) In other words, prompt inquiry regarding the *injuries* in all their details by the commission was evidently intended by the lawmakers".

The supreme court of Illinois has had this question of limitation of time for filing claim for compensation before it and has held such provision mandatory, and the claim barred unless made within the time. *Haiselden* v. *Industrial Board,* 275 Ill. 114; *Bushnell* v. *Industrial Board,* 276 Ill. 262.

The New York act differs from our act with reference to the giving of notice and patterns after the idea of the English act. It contains this provision (section 18, art. 2, chap. 41, Laws of New York, 1914):

"The failure to give such notice unless excused by the commission either on the ground that notice for some sufficient reason could not have been given, or on the ground that the State fund, insurance company, or employer, as the case may be, has not been prejudiced thereby, shall be a bar to any claim under this chapter."

But it was held that the commission might not arbitrarily excuse the failure to give notice. *Prokopiak* v. *Buffalo Gas Co.,* 176 App. Div. 128; *Sicardi* v. *Sarnoff Hat Co.,* 176 App. Div. 13, and in *Bloomfield* v. *November,* 219 N. Y. 374, it was said in the majority opinion of the court of last resort:

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"We do not intend to qualify what has often been said by this court to the effect that the compensation law should be liberally construed to the end of accomplishing the purpose for which it was enacted, and that the course of the claimant should not be beset with technicalities. The legislature, however, has deemed it proper and essential, under ordinary circumstances, that a written notice of disability and claim should be promptly served so as to give an employer the opportunity to investigate the circumstances of the claim. This requirement ought not to be treated as a mere formality or be dispensed with as a matter of course whenever there has been a failure to serve such notice."

Upon principle, we are persuaded that the defendant must prevail in its contention. When the bolt fell, striking the plaintiff on the head, it fractured his skull. That was the injury. The formation of an abscess, the accumulation of pus, the softening of the bone, were the results of that fracture—of the injury received; while these results rendered the injury more severe, the injury was there from the first and subsequent want of care but aggravated it. Had the plaintiff then made his claim for compensation and had proper medical treatment, which his employer was bound to pay for under the provisions of section 4, it is highly probable he would have been saved much pain, and a serious and expensive operation would have been obviated. This would have been beneficial alike to him and his employer.

While the words "accident" and "injury" are not synonymous, the accident produced the injury and in point of time they were concurrent. We are compelled to hold, must hold, unless we resort to judicial legislation, that the legislature by these two sections fixed the date of the injury at the date of the accident, and not some remote date thereafter when the injured employee became definitely satisfied that he was disabled as a result of the accident.

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It follows that the award for compensation and for medical services rendered nearly a year after the date of the injury must be reversed and vacated.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, and STONE, JJ., concurred. KUHN, J., did not sit.

McMULLEN *v.* GAVETTE CONSTRUCTION CO.

MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—MEDICAL AND HOSPITAL SERVICES—LIMITATION.

An award of compensation, under the workmen's compensation law, for medical and hospital services, is limited, by section 4, part 2, of the act, to the first three weeks after the accident. *Cooke* v. *Holland Furnace Co.*, *ante*, 192.

Certiorari to Industrial Accident Board. Submitted January 18, 1918. (Docket No. 130.) Decided March 27, 1918.

Roy McMullen presented his claim for compensation against the Gavette Construction Company for medical and hospital services. From an order awarding compensation, defendant and the Globe Indemnity Company, insurer, bring certiorari. Reversed.

Douglas, Eaman & Barbour, for appellants.

Herbert W. Smith, for appellee.

FELLOWS, J. But a single question is presented upon this record. The weekly compensation seems to have

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been agreed upon. The amount allowed by the award here reviewed is for medical and hospital services performed after the first three weeks after the accident. The accident occurred November 20, 1916. The services here involved were performed during the three weeks following the 5th of January, 1917. The plaintiff, a carpenter, slipped on a frosty roof and fell 20 feet to the ground, causing serious injury. The defendant construction company sent a physician to examine and treat him. It is a controverted question as to whether the physician properly examined and properly treated him. We think it may also fairly be said that the necessity of the particular operation was a controverted question. The board found with the plaintiff as to both of these questions, and we are bound by such findings. It is undisputed that all of the items included in the award were furnished or performed after the first three weeks after the accident and during the three weeks succeeding January 5th.

We have fully considered the question here involved in the case of *Cooke* v. *Holland Furnace Co., ante,* 192, and there held that the date of the accident fixed the date of the injury under section 4, part 2, of the workmen's compensation act (2 Comp. Laws 1915, § 5434), and that the board was not authorized by the act to award and compensate the employee for medical and hospital services performed more than three weeks after the accident. The authority for such allowance by the board does not exist, except per force of the statute, and the legislative judgment has limited the allowance to such services as are performed during the first three weeks after the injury. Nor has the board authority to award as damages the amount paid for such services performed at a later date, upon the theory ingeniously advanced that the failure to furnish proper medical and hospital services created a

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liability for the payment of such services so performed which may be awarded by the board as damages. The board is an administrative body created to carry the provision of the act into effect. *Mackin* v. *Detroit-Timkin Axle Co.*, 187 Mich. 8, and, while it may determine the compensation to be paid in a given case, it must do so pursuant to the terms of the act, and circumscribed by its provisions. It has no power given it by the act to fix and measure such compensation by the amount of damages provable, as in an action at law for a breach of either statutory or common law duty. *Andrejwski* v. *Wolverine Coal Co.*, 182 Mich. 298.

The injury in the instant case was a serious one, the operation and hospital services expensive. The language of Mr. Justice BIRD, speaking for this court, in *Hirschkorn* v. *Fiege Desk Co.*, 184 Mich. 239, is applicable here:

"The award made by the board was a very equitable one, and is one which we would prefer to sustain, if we could do so without attempting to amend the law by judicial construction. It appears to be, however, an exigency which the law has not provided for. We think the relief in such cases lies with the legislature, rather than with the courts."

The case is controlled by the *Cooke Case, supra,* and the award must be vacated.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred.

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HOMAN *v.* BOARDMAN RIVER ELECTRIC LIGHT & POWER CO.

MASTER AND SERVANT — WORKMEN'S COMPENSATION LAW — ACCIDENTAL DEATH—REVIEW.

On certiorari to review an award of compensation by the industrial accident board, under the workmen's compensation law, the finding of the board that the death of plaintiff's decedent was the result of an accident, in the absence of fraud, if supported by the testimony, is binding upon the Supreme Court, notwithstanding conflicting medical testimony as to the cause of death.

Certiorari to Industrial Accident Board. Submitted January 15, 1918. (Docket No. 88.) Decided March 27, 1918.

Effie L. Homan presented her claim for compensation against the Boardman River Electric Light & Power Company for the accidental death of her husband in defendant's employ. From an order awarding compensation, defendant and the Fidelity and Casualty Company, insurer, bring certiorari. Affirmed.

Parm C. Gilbert, for appellant.

Patchin & Duncan, for appellee.

FELLOWS, J. Plaintiff, as the widow and dependent of John Homan, deceased, was awarded $5.77 per week for 300 weeks by a committee on arbitration selected pursuant to the provisions of the employer's liability act. The award was affirmed by the full board and this writ of certiorari was allowed to review such action by the board.

John Homan was a workman in the employ of the Boardman River Electric Light & Power Company, hereafter called the defendant, on Thursday, August

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17, 1916, in the work of repairing the chute in its power dam at Traverse City. He, with other employees, was at the time of the accident fixing the floor of the spillway. Deceased was carrying planks. After laying one down he started to return for another; the floor of the spillway being moist and slippery he fell, striking his head on the side of the chute. He was dizzy for a few minutes and the foreman offered to take him home in his car, but deceased declined the offer and resumed his work and worked until about 11 or 11:30, when he went home to dinner. He then complained of pains in his head, but returned and worked in the afternoon. The following day he did not work. It is to be inferred that weather conditions prevented resuming the work in hand. On Saturday he worked some, but not on the spillway. When at home he complained of pains in his head, also in his back and hip; he was cold and weak and dizzy and had to take hold of things to steady himself. He was irrational and a lump came out at the end of his spine. On either Sunday or Monday following the accident deceased took to his bed and never recovered. His death occurred September 3d. On Monday following the accident Dr. Wilhelm was called and treated Mr. Homan until his death. His testimony tends to show that deceased had a typical case of pneumonia which ran its course and left him so debilitated that he could not recover. Dr. Johnson saw and examined Mr. Homan the day of his death. His testimony tends to show that there were no clinical signs of pneumonia in the lung at the time of his examination; that he and Dr. Holdsworth performed an autopsy on the body of deceased, found no signs of pneumonia in the lung, and there would have been some signs if pneumonia caused his death. It also appears that specimens of the lung tissue were sent to Dr. Warthin, of the university, for microscopical examination; it also appears

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that he made a report in writing. The report is not returned to us and is not in the printed record, but from the course of the testimony it is to be inferred that his report was unfavorable to defendant. It seems to have been so treated by both parties. Dr. Johnson made out the death certificate, assigning the cause of death as "peritonitis due to paralysis of brain," which he testifies was his conclusion, based on all the matters found by him.

Defendant urges that it is conclusively established that deceased died from pneumonia which was not the result of the accident. It is urged that Dr. Wilhelm has successfully pointed out that all the facts testified to by the other physicians may be true without in any way contradicting his conclusion that death resulted from pneumonia. It is urged that the death of Mr. Homan was not the result of an injury arising out of and in the course of his employment, that no cause of death is shown which renders defendant liable. Reduced to its final analysis it is the claim of defendant that the finding of the industrial accident board is not supported by the testimony. It is pointed out by defendant that at one place in the opinion of the board it is stated that the board thinks the shock was sufficient to assist in bringing on pneumonia, and it is urged with considerable reason that the testimony fails to support this suggestion. We might agree with defendant that the testimony establishes that if deceased had pneumonia it was not traumatic, but we are more concerned with the findings of the ultimate facts than with each and every detail of the opinion. If the finding of the ultimate facts upon which the award is based finds support in the testimony it is our duty to accept such finding as final, in the absence of fraud. Section 5465, 2 Comp. Laws 1915; *Reck* v. *Whittlesberger*, 181 Mich. 463; *Rayner* v. *Furniture Co.*, 180 Mich. 168. And this rule is applicable where

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there is conflicting medical testimony as to the cause of the death. *Vogeley* v. *Lumber Co.*, 196 Mich. 516. In the instant case we are unable to say that there was no testimony supporting the finding of fact of the board that Mr. Homan's death was the result of the injuries received by him on August 17th, while in the employ of the defendant; on the contrary, we are impressed that the testimony of Dr. Johnson and that of plaintiff who described his condition when he was at home, from the time he received the injury until he took to his bed and thereafter until his death, fully supports the finding and award of the industrial accident board.

We find no occasion to disturb the award, and it is affirmed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred.

JOHNSTON *v.* CORNELIUS.

1. AUTOMOBILES — MOTOR VEHICLE LAW — NEGLIGENCE — FELONY —STATUTES.

Actionable negligence must be proved in order to recover for the death of a pedestrian accidentally killed on a public street by one violating the provisions of Act No. 33, Pub. Acts 1909 (3 Comp. Laws 1915, § 15431), prohibiting, under penalty, the unauthorized taking or using of automobiles, notwithstanding the provisions of section 14577, 3 Comp. Laws 1915, permitting recovery for the death of a person under circumstances amounting in law to a felony, since it does not create a cause of action

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where there is no causal connection between the death and the felony.

2. SAME—PEDESTRIANS—UNAUTHORIZED TAKING OF AUTOMOBILE—RIGHT OF ACTION.

Act No. 33, Pub. Acts 1909, prohibiting the unauthorized taking or using of automobiles, does not of itself give a right of action to pedestrians injured upon the street; they not belonging to the class for whose protection the law was passed.

3. APPEAL AND ERROR—RES JUDICATA—ADMISSIONS.

Where it was conceded upon a former trial that the accident occurred in a residence street, such admission was conclusive upon plaintiff on the second trial.

4. AUTOMOBILES—MOTOR VEHICLE LAW — NEGLIGENCE — LIGHTS — AUDIBLE WARNING.

The driver of an automobile who approached a pedestrian in the street on a dark and rainy night owed a duty of giving reasonable warning of his approach, and this duty was not discharged by the presence of lights on his machine, since subdivision 1, § 6, Act No. 318, Pub. Acts 1909 (1 Comp. Laws 1915, § 4812), requires an automobile to have "a suitable and adequate bell, horn or other device," for the purpose of "signaling."

5. TRIAL—AUTOMOBILES—DEATH—WARNING—INSTRUCTIONS.

In an action for the negligent killing of plaintiff's decedent, who was struck, on a dark and rainy night, while in a public street for the purpose of taking a street car, by an automobile driven by defendant, an instruction by the trial court that, "the automobile having the usual lights upon it at the time, there was, as a matter of law, a reasonable warning," taken in connection with his failure to instruct that defendant owed a duty to a pedestrian in a public highway to give an audible warning of his approach, amounted to reversible error. Subdivision 2, § 7, and subd. 1, § 6, Act No. 318, Pub. Acts 1909 (1 Comp. Laws 1915, §§ 4818, 4812).

Error to Kent; Perkins, J. Submitted January 17, 1918. (Docket No. 18.) Decided March 27, 1918. Rehearing denied April 25, 1918.

Case by Eleanore M. Johnston, administratrix of the estate of Andrew W. Johnston, deceased, against

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Russell Cornelius for the negligent killing of plaintiff's intestate. Judgment for defendant. Plaintiff brings error. Reversed.

Ellis & Ellis, for appellant.

Lombard, Hext & Chase, for appellee.

FELLOWS, J. Plaintiff brought this action against Harold C. Cornelius and Russell Cornelius for the negligent killing of decedent Andrew W. Johnston, her husband. Upon the first trial the jury disagreed as to defendant Russell Cornelius and the court directed a verdict as to defendant Harold C. Cornelius. To review the judgment rendered on the verdict so directed plaintiff sued out a writ of error from this court. The case will be found reported in 193 Mich. 115. This court there affirmed such judgment. A statement of the facts of the case will be there found and it will only be necessary to here state such facts as became important upon the second trial, and as bear upon the questions here involved. This we will do as we proceed.

Upon the second trial, which proceeded against Russell Cornelius alone, a verdict for the defendant was arrived at by the jury and plaintiff prosecutes this writ of error to review the judgment entered thereon.

On the second trial, as on the first, it appeared that the automobile driven by the defendant on the evening in question when he ran over the deceased, causing the injuries which resulted in his death, was owned by his father, Harold C. Cornelius, and that defendant had taken it without the knowledge and consent of his father and in violation of his directions and instructions. It is now claimed by the plaintiff that, such being the case, defendant violated the provisions of Act No. 33, Pub. Acts 1909 (3 Comp. Laws 1915, § 15431), that his use of the car so taken was a felony,

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that its use under such circumstances was negligence *per se*, and in and of itself warranted a recovery under section 14577, 3 Comp. Laws 1915, without any evidence of negligence in its use and operation on the street. The last cited section was originally passed in 1848 (Act No. 38, Laws 1848); it has since been amended. It is a remedial statute, though in derogation of the common law. *Merkle* v. *Township of Benningtón*, 58 Mich. 156. By the ancient common law felony was punished by the death of the criminal and his lands and goods were forfeited to the crown. Such being the situation, neither body execution nor execution against lands or chattels was available; it would be an interference with the royal prerogative for a private suitor to attempt recompense from the estate of the felon, and the action of the private suitor was held to be merged in the public offense. 1 R. C. L. p. 327. This statute, in derogation of the common law, permits recovery, "notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony," but it does not create a cause of action where there is no causal connection between the death and the felony. It cannot be given the effect claimed for it by the plaintiff.

Nor are we persuaded that Act No. 33, of the Public Acts of 1909, of itself gives a right of action to pedestrians injured upon the street; they do not belong to the class for whose protection the law was passed. Plaintiff cannot claim any benefit from it. It is said in 1 Thompson on Negligence, § 12:

"* * * And it may be stated as a general proposition—though there may be difficulty in some cases in applying it—that the violation of a statute or municipal ordinance is not of itself a cause of action grounded upon negligence in favor of an individual, unless the statute or ordinance was designed to prevent such injuries as were suffered by the individual claim-

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ing the damages, and often not then, the question depending upon judicial theories and surmises."

See, also, *Taylor* v. *Railroad Co.*, 45 Mich. 74; *Richards* v. *Waltz*, 153 Mich. 416; *Syneszewski* v. *Schmidt*, 153 Mich. 438; *Mairs* v. *Railroad Co.*, 175 N. Y. 409; *Lepard* v. *Railroad Co.*, 166 Mich. 373; *Lindsay* v. *Cecchi*, 3 Boyce (Del.), 133; *Latham* v. *Railway Co.*, 164 Ill. App. 559.

Error is also assigned upon the instruction by the court that the locality where the accident occurred was a residence section of the city. The court, among other reasons for so instructing the jury, stated that upon the former trial it was conceded that this was a residence section of the city. Such being the case, the trial court committed no error in this instruction. This was a judicial admission and the court was not in error in considering it conclusive on the plaintiff on the second trial. *Connor* v. *Railway Co.*, 168 Mich. 29.

The defendant, driving a heavy Cadillac car, ran over the deceased about nine o'clock in the evening of November 28, 1913, on Michigan street in the city of Grand Rapids, causing such serious injuries that death resulted some two weeks later. The evening was dark and it was raining. Deceased was escorting a young lady who had called at the home of himself and plaintiff to the street car line which ran east and west on Michigan street. It is undisputed that a man named McMillan was standing in the street near the track awaiting the approaching car. It is in dispute the distance decedent and his companion had proceeded in the street when they were struck by the car driven by defendant; plaintiff's witnesses giving testimony tending to show that they were quite near Mr. McMillan out in the street; defendant's, that they were much nearer the curb. The trial court, after calling the attention of the jury to the statutory duty of

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drivers of automobiles, and after reading the provisions of the statute and the ordinance of the city of Grand Rapids, charged them as follows:

"Under the second section of the State law to which your attention has been called, it is claimed by the plaintiff that the defendant in approaching this crossing, was also approaching a Mr. McMillan who was standing in the highway waiting for this west-bound street car, and that therefore the defendant should have given reasonable warning of his approach and slowed down to a speed not exceeding ten miles an hour. That is substantially the provision which I have read to you. The question for the jury to consider and for the court to instruct the jury upon particularly, is in relation to the warning provided by this statute. The statute provides that a reasonable warning shall be given to a person standing in the street, if there be one. I instruct you that under the undisputed testimony, it appears that the defendant, as he approached this crossing, saw Mr. McMillan standing near the street car track, and also that Mr. McMillan saw the approaching automobile. Under these circumstances, the automobile having the usual lights upon it at the time, there was, as a matter of law, a reasonable warning given to Mr. McMillan who was standing waiting to take this car. So in its last analysis, these two sections of the State law as applied to this case, relate and will be confined to the speed with which the automobile was approaching this crossing, the one provision limiting the speed to fifteen miles an hour, and the other provision limiting the speed to ten miles per hour, as I understand it, under the circumstances shown in this case."

In no part of his charge did the court instruct the jury that defendant owed a duty to a pedestrian in a public highway to give an audible warning of his approach. The instruction given and the failure to instruct here noted could lead the jury to but one conclusion, viz.: That defendant owed no duty to decedent if he was in the street to give other warning of his approach than by his lights, and that an audible

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warning was not required. This was reversible error. If decedent was in a public highway as the defendant approached the intersection of Michigan street and North avenue, and there was testimony tending to show that he was, defendant owed a duty of giving reasonable warning of his approach, and this duty was not discharged by the presence of lights on his machine. The provision of the statute is subdivision 2, of section 7, Act No. 318, Pub. Acts 1909 (1 Comp. Laws 1915, § 4818), and reads as follows:

"Upon approaching a person walking in the roadway of a public highway, or a horse or horses, or other draft animals, being ridden, led or driven thereon, a person operating a motor vehicle shall slow down to a speed not exceeding ten miles an hour and give reasonable warning of its approach, and use every reasonable precaution to insure the safety of such person or animal, and in case of a horse or horses or other draft animals, to prevent frightening the same."

It is also provided by subdivision 1, section 6, of the same act (section 4812), as follows:

"Every motor vehicle, operated and driven upon the public highways of this State, shall be provided with adequate brakes sufficient to control the vehicle at all times, and a suitable and adequate bell, horn or other device for signaling, and shall, during the period from one hour after sunset to one hour before sunrise, display at least two lighted lamps on the front and one on the rear of such vehicle, which shall also display a red light visible from the rear."

By the latter provision the automobile must not only be provided with lights in the night time but must also have "a suitable and adequate bell, horn or other device," and the purpose is stated to be "for signaling." When we read the two provisions together, as we must do, it is clear that the legislature contemplated an audible warning when approaching pedestrians in the streets and highways. This is empha-

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sized when we consider how impossible it is to gauge the distance of an oncoming automobile by the lights upon it in a dark night, while the sound of an automobile horn furnishes a much more accurate warning of its location. The purpose of this legislation was to save human life, and minimize the number of injuries to pedestrians on the streets and highways. It lays a statutory duty upon drivers of automobiles which may be greater than the duty of exercising ordinary prudence, but the driver of automobiles must, nevertheless, discharge such duty or respond for its neglect. *Levyn* v. *Koppin*, 183 Mich. 232.

Plaintiff moved for a new trial, urging among other grounds, that the verdict was against the weight of the evidence. The motion was overruled and error is assigned thereon. We are not persuaded that the verdict is against the weight of the evidence. There was a sharp conflict of testimony on the material points, and we are not impressed that we should disturb the judgment on this ground.

We have examined the other errors assigned, and find them without merit.

For the error pointed out the judgment must be reversed with a new trial. Plaintiff will recover costs of this court.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred.

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WARD v. CAREY.

1. APPEAL AND ERROR—ASSIGNMENTS — WAIVER — SUPREME COURT RULE.

Assignments of error not discussed in counsel's brief must be deemed to be waived and abandoned. Supreme Court Rule No. 40.

2. CONVERSION—EVIDENCE—PARTNERSHIP— AUTOMOBILES — RECEIPT —AUTHORITY OF PARTNER TO SIGN FIRM NAME.

Where plaintiffs, in an action for the conversion of an automobile sold to them as part of the property of a garage business, of which they claimed to have been put in possession by the vendors, copartners, which fact was in dispute, a receipt for part of the purchase price, signed in the firm name by one of the partners, in the presence of the other, who received the money, was admissible as proof of the transaction, and was not open to the objection that there was no evidence that the signer was authorized to sign the firm name.

3. SAME—EVIDENCE—ACTS OF DOMINION—DEMAND.

Under plaintiffs' theory of the case that there had been a completed sale, it was competent for them to show their acts of dominion over the property after the sale, and also to show that after defendant took the car they made a demand on him for it, and what conversation was had between the parties on that occasion.

4. SAME—VALUE OF CAR—WITNESSES—COMPETENCY.

Where a witness testified that he was in the business of selling automobiles; that he had handled cars for eleven years; that he was the agent for the same make of car, and was engaged in selling them; that he had seen and driven the car in question, he was qualified to testify as to its value, and the price at which it was sold.

5. SAME—RESCISSION—CONTRACTS—INABILITY TO PERFORM—TRIAL.

The exclusion of testimony as to the ownership of the lease, attempted to be developed by defendant on cross-examination, for the purpose of showing a rescission of the contract of sale to plaintiffs by the vendors, and a subsequent sale of the automobile to defendant, for the reason that

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the vendors were unable to transfer the lease, was not error, since their inability to perform would not entitle them to rescind, nor release them from their obligation to perform.

6. APPEAL AND ERROR—EVIDENCE—CUMULATIVE EVIDENCE.
Where one of the plaintiffs had already testified that he was present when defendant took the car, and did not protest, it was not prejudicial error to exclude further evidence of the fact.

7. TRIAL—EVIDENCE—REBUTTAL.
There was no error in permitting plaintiffs, in rebuttal, to contradict evidence given by defendant's witnesses.

8. SAME—EVIDENCE—ISSUE—QUESTION FOR JURY.
Testimony of three witnesses to the fact that plaintiffs were copartners was sufficient to take the question to the jury.

9. CONVERSION—TRIAL—BONA FIDE PURCHASER.
The court below was not in error in refusing to direct a verdict for defendant on the ground that he was a *bona fide* purchaser of the automobile, since his belief that his vendor was the true owner could not defeat recovery by the true owner.

10. NEW TRIAL—WEIGHT OF EVIDENCE.
A motion for a new trial on the ground that the verdict was against the great weight of the evidence was properly denied.

11. APPEAL AND ERROR—PLEADING—PRACTICE—DEFENSES—REVIEW.
The question as to plaintiffs' failure to file their certificate of copartnership, as required by the statute, cannot be raised for the first time by defendant upon motion for a new trial.

Error to Ingham; Collingwood, J. Submitted January 9, 1918. (Docket No. 23.) Decided March 27, 1918.

Case by Frank Ward, Harry Scarlett and Albert Scarlett, copartners as Ward, Scarletts & Co., against James J. Carey for the conversion of an automobile. Judgment for plaintiffs. Defendant brings error. Affirmed.

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John F. Berry, for appellant.

Seymour H. Person, for appellee.

FELLOWS, J. January 4, 1916, John A. Hicks and Charles Dunn were operating a garage and Oakland sales agency on Michigan avenue east, in the city of Lansing. It was known as the Central Garage. At the same time plaintiffs were operating a garage at North Lansing and were handling the Chevrolet cars. On the evening in question the parties, having previously had some negotiations, got together at plaintiffs' office in North Lansing, and finally agreed upon the terms of a sale of the Central Garage to plaintiffs for the sum of $1,400. Fifty dollars was paid on the purchase price and a receipt given therefor. The assets of the Central Garage consisted of one Oakland-six car, some accessories, and the lease of the location. On January 5th, some or all of the plaintiffs went to the Central Garage. The extent to which they took possession of the garage and its contents is one of the disputed questions in the case; plaintiffs insisting that they were given the keys and that full and exclusive possession was turned over to them; that they were introduced to customers and the employees as the purchasers and proprietors of the garage, had complete dominion of the garage and that the sale was a completed sale, except that the lease was not assigned to them, although it is undisputed that they paid a month's rent to Mr. Dunn. Much of this testimony was controverted by testimony produced by the defendant, who insists that the sale to plaintiffs was not a completed one, that exclusive possession of the garage was not given plaintiffs; that Hicks and Dunn were unable to procure an assignment of their lease to plaintiffs, and that on the 7th day of January, said Hicks and Dunn sold said business, including the lease and the Oakland car to the

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Capital Auto Company, and on the same day he bought the car of the Capital Auto Company in good faith and that he took possession of it at the Central Garage, and drove it away believing he had a right so to do. After defendant took the car plaintiffs demanded it of him, and, upon his refusal to comply with such demand, brought this action for its conversion. Plaintiffs had verdict and judgment and defendant reviews the case here.

There are 87 assignments of error and upon the argument defendant's counsel stated that they were all relied upon, but in the brief of counsel it is found that but few of them are discussed. Such as are not discussed in appellant's brief must be deemed to be waived and abandoned. Supreme Court Rule No. 40; *Nissly* v. *Railway Co.*, 168 Mich. 676; *Smith* v. *Construction Co.*, 175 Mich. 603. It therefore becomes unnecessary to consider all the assignments of error and we shall only examine those discussed in appellant's brief.

We have stated that on the evening of the 4th of January, fifty dollars was paid on the purchase price of the Central Garage and a receipt given. This receipt was signed in the firm name by Mr. Hicks, a member of the firm. When this receipt was offered in evidence defendant objected on the ground that there was no evidence that Mr. Hicks was authorized to sign the firm name. It is not claimed that these two men were not partners; indeed defendant claims title through such partnership. Plaintiffs claim that both Mr. Hicks and Mr. Dunn were present when this receipt was signed. Mr. Dunn was called as a witness by defendant and admitted that he was present at this transaction and when the receipt was signed, and that while Mr. Hicks signed the receipt the check for the $50 was given to him and he cashed it. Defendant's objection was without merit.

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Under plaintiffs' theory of the case, that there had been a completed sale, it was competent for them to show their acts of dominion over the property after the evening of January 4th. It was also competent for them to show that after defendant took the car they made a demand on him for it and what conversation was had between the parties on that occasion.

It is next insisted that the court erred in permitting the witness, Harry Scarlett, one of the plaintiffs, to give evidence as to the value of this car, on the ground that he was not qualified. The witness had testified that he was in the business of selling automobiles, that he had handled cars about 11 years; that he had been the agent of the Oakland Company selling their Oakland sixes. He had seen and driven this car. He was, therefore, qualified to testify to the value of the car and the price at which it was sold. Both parties gave testimony tending to show that the car was a new one, had only been driven for demonstration purposes; defendant in his testimony says: "It had been driven a very few miles; I don't think it was a hundred miles if I remember correctly." There was no error committed in receiving this testimony of the witness Scarlett.

One of defendant's witnesses was asked the question: "You may state who held the lease to the property known or occupied by the Central Garage in the city of Lansing at that time?" The answer was excluded. We might dispose of this particular question by saying that it called for a conclusion of the witness and that the lease was the best evidence as to who was the lessee and what its terms were, or by calling attention to the fact that the record discloses that later in the case defendant was permitted to make proof by the witness Dunn of all that he sought to prove by this witness; but the theory of defendant in offering this and other proof requires attention. It

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does not appear to be seriously controverted by plaintiffs that after the transaction on the evening of January 4th, Hicks and Dunn encountered difficulty in performing all the terms of their contract, in that they were unable to obtain consent to the transfer of their lease to the plaintiffs. Defendant insists and was permitted to prove that upon Hicks and Dunn learning that they could not transfer their lease to plaintiffs, Mr. Dunn so informed plaintiffs and tendered them the $50 paid on the evening of January 4th. He insists that this amounted to a rescission of the contract. In this he is in error. While it is true that upon failure of the vendor to perform a material part of his contract the vendee may elect to treat the contract at an end, still the vendor, upon learning his inability to perform a material part of the contract, may not rescind the contract and relieve himself from its terms, or an action for its breach. He has contracted to deliver to the vendee the property sold, and his inability to comply with his contract does not relieve him from its obligations. While the vendee may rescind for the default of the vendor, the vendor may not rescind for his own default. What we have here said applies to the offered telephone conversation on this subject.

Error is assigned upon the refusal of the court to permit defendant to testify that when he took the car Albert Scarlett, one of the plaintiffs, was present and did not protest. But Albert Scarlett had already given testimony in the case and had testified and admitted that he was present on this occasion and did not protest. It was not prejudicial error to exclude further evidence of a fact already proved and admitted by the other side. Whether the reason of the court for the ruling was correct or not, is unimportant. Nor was there error in permitting plaintiffs, in rebuttal, to in-

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troduce evidence contradictory to evidence given by defendant's witness.

Defendant's counsel moved for a directed verdict on two grounds. The first of these being that there was no evidence that plaintiffs were partners. It is sufficient, in answer to this ground, to say that we find in the testimony of each of three witnesses sufficient to take this question to the jury. The other ground was that defendant was a *bona fide* purchaser of the car. If these plaintiffs were the owners of this car, and the jury found they were, defendant had no right to take and convert it to his own use. He does not claim to have acquired title through plaintiffs; the fact that he, in good faith, believed that the party from whom he purchased it was the rightful owner cannot defeat recovery by the true owner. The motion to direct a verdict for these two reasons was properly overruled.

Defendant moved for a new trial, alleging among other reasons, that the verdict was against the great weight of evidence. We are not persuaded that the verdict is against the weight of the evidence. It does not so appear to us, and we have read this record with care. In this motion defendant asks for a new trial because there was no proof that plaintiffs had filed their certificate of copartnership, as required by the statute. It is not pointed out in the motion, or in the brief whether defendant refers to Act No. 101, Pub. Acts 1907 (2 Comp. Laws 1915, §§ 6349-6353), or Act No. 164, Pub. Acts 1913 (2 Comp. Laws 1915, §§ 6354-6359), and authorities dealing with both acts are indiscriminately cited. While defendant was permitted to amend his notice so as to avail himself of this question, if he so desired, we are unable to find in the record that this question was in any way raised upon the trial. Such being the case it cannot be raised for the first time on a motion for a new trial. *Selling*

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v. *Berger*, 161 Mich. 526; *Mahiat* v. *Codde*, 106 Mich. 387.

No reversible error having been pointed out in this record, the judgment is affirmed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred.

THOMAS *v.* BUSH.

1. APPEAL AND ERROR—ASSIGNMENTS OF ERROR—REVIEW.
   Assignments of error upon the admission and rejection of testimony which did not affect the controlling question, will not be reviewed in the appellate court.

2. MALICIOUS PROSECUTION—PROOF TO BE ESTABLISHED.
   In an action for malicious prosecution, three distinct propositions must be established: (1) The fact of the alleged prosecution, and that it terminated in plaintiff's favor; (2) that defendant had not probable cause; (3) that defendant acted from malicious motives.

3. SAME—PROBABLE CAUSE—EVIDENCE—QUESTION OF LAW.
   In an action for malicious prosecution, where the facts are undisputed, the want of probable cause is a question of law to be determined by the court.

4. SAME — PROBABLE CAUSE — PROOF — DEFENSES — GOOD FAITH—MALICE.
   In an action for malicious prosecution, where the prosecuting witness has in good faith fully and fairly stated all the material facts within his knowledge to the prosecuting officer, and acted upon his advice, proof of the fact establishes a case of probable cause, negativing the inference of malice.

5. SAME—PROBABLE CAUSE—EVIDENCE—DIRECTED VERDICT.
   In an action for malicious prosecution, where plaintiff, his

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brother and another were arrested for the theft of a piece of hose from a water tank in defendant's farm yard, on complaint of defendant, who, after being informed of the taking of the hose and the names of the persons who took it, stated all the facts within his knowledge fully and fairly to the prosecutor, who authorized the issuance of the warrant, the fact of probable cause was established as a matter of law, although it appeared that the hose was taken by plaintiff's brother, who claimed to own it, without the knowledge of plaintiff, and the latter was discharged from custody without a trial.

6. SAME—ABUSE OF PROCESS—EVIDENCE—DIRECTED VERDICT.
In such action, where all that defendant did after the issuance of the warrant was to demand the return of the hose, which he and his tenant had paid for and believed they owned, and there was no use of the warrant to attempt to extort money or effect a settlement, there was no evidence of abuse of process, and the court was not in error in directing a verdict for defendant.

Error to Calhoun; North, J. Submitted January 24, 1918. (Docket No. 186.) Decided March 27, 1918.

Case by Stuart K. Thomas against Sumner Bush for malicious prosecution. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

James M. Powers, for appellant.

James Cleary and *Joseph L. Hooper*, for appellee.

Defendant lives in Battle Creek and owns a farm of 560 acres in LeRoy township, Calhoun county. The farm is run by a Mr. Drake and his son Harry. It is operated under the firm name of A. Drake & Son. Defendant has one-half the income. On December 6, 1915, there was purchased of one Charles Lowe, in the name of A. Drake & Son, an outfit consisting of one second-hand Port Huron engine; one Plano cornhusker and sheller; one ensilage cutter with pipe; one buzz

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saw; one water tank and wagon; one set of flues for engine and all belts and attachments that belong to above goods. Defendant paid one-half the purchase price and drew the bill of sale. There was nothing reserved from the above, either in the bill of sale or orally. To the water tank was attached a piece of hose. The following March the plaintiff, his brother Emerson, and a Mr. Gray stopped at the farm of defendant to get some water for the radiator of defendant's automobile; it was just getting dusk. Defendant's brother Emerson saw the piece of hose above referred to. He testifies, and there is no testimony to contradict him, that this piece of hose was given to him by the city of Battle Creek when he was oiling the streets there, and by him loaned to Mr. Lowe. He proceeded to cut the hose off the tank, put it in his brother's automobile and the party drove away. Plaintiff did not know of the taking of the hose until he saw it in the automobile. Some of the workmen at the Bush farm saw the party about the water tank, and when Mr. Drake, Jr., noticed the loss of the hose he made inquiry and received information which led him to the names of the three men in the party. He called up the defendant and informed him of the transaction. Defendant inquired if he had not better take counsel and Mr. Drake told him he thought he should. He thereupon got in communication with the prosecuting attorney and made an appointment to see him. He fully stated the circumstances to the prosecuting attorney and was advised by him to make complaint. The prosecuting attorney called up the justice and told him a warrant might issue. He also advised defendant to make a demand for the hose. Defendant made the complaint against the three accordingly and demanded the return of the hose. Emerson Thomas claimed to own it. Plaintiff was arrested upon a warrant issued on the complaint and was subsequently discharged

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without a trial. He brings this action, counting in his first count for malicious prosecution, and in his second count upon the abuse of criminal process. At the close of the case the court directed a verdict for the defendant and plaintiff prosecutes this writ of error.

FELLOWS, J. (*after stating the facts*). Errors are assigned upon rulings of the trial court during the progress of the trial. As none of the testimony admitted over plaintiff's objection affects the controlling question, and as no proof offered by him was rejected which could affect it, these assignments of error become unimportant. The controlling question of whether the court properly directed a verdict for the defendant is the only one meriting consideration.

In an action for malicious prosecution three distinct propositions must be established: (1) The fact of the alleged prosecution and that it terminated in plaintiff's favor; (2) that defendant had not probable cause; (3) that he acted from malicious motives. *Hamilton* v. *Smith,* 39 Mich. 222. Plaintiff has established the first of these propositions. He insists that the third may be inferred from a want of probable cause, and that the question of probable cause was for the jury. There is no claim that defendant instituted the criminal proceedings because of any past differences between him and plaintiff, as it is undisputed that he was not acquainted with plaintiff. The case must turn upon the question of probable cause. It is the settled rule in this State that where the facts are conceded, or are undisputed, the want of probable cause is a question of law to be determined by the court. *Gilecki* v. *Dolemba,* 189 Mich. 107; *Rogers* v. *Olds,* 117 Mich. 368; *Birdsall* v. *Smith,* 158 Mich. 390; *Fleckinger* v. *Taffee,* 149 Mich. 678; *Huntington* v. *Gault,* 81 Mich. 144.

It is also equally the settled law of the State that

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in actions for malicious prosecution and false imprisonment, where the prosecuting witness has in good faith fully and fairly stated all the material facts within his knowledge to the prosecuting officer and acted upon his advice, proof of the fact establishes a case of probable cause. *Smith* v. *Tolan,* 158 Mich. 89; *Rogers* v. *Olds, supra; Wakely* v. *Johnson,* 115 Mich. 285; *Huntington* v. *Gault, supra.* In the last cited case it was said:

"When the facts are undisputed, want of probable cause is purely a question of law. In this case the facts are undisputed that Gault did place all the facts before the prosecuting attorney, not only by himself, but by disinterested witnesses, and acted upon his opinion. The testimony of Gault and of the prosecuting attorney upon this point is not contradicted, and the question became one, as before said, of law, and the circuit judge should have instructed the jury that the plaintiff had failed to show that there was a want of probable cause to make the complaint. The defense that the prosecution was instituted by advice of counsel was as conclusively established as was the fact that the prosecution was instituted by defendant, or that the prosecution had terminated, and called for like instructions to the jury."

In the instant case the undisputed testimony of the defendant establishes that defendant fully and fairly stated to the prosecuting attorney all the facts, within his knowledge, surrounding the transaction. The testimony of the defendant and of the prosecuting attorney undisputedly establishes that the prosecuting attorney advised making the complaint, and instructed the justice that the warrant might issue. Not only are these facts established by the undisputed testimony, but there are no inferences or circumstances in any way casting discredit on their testimony, or imputing a want of good faith on the part of either the prosecuting attorney or the defendant. The question, therefore, became one of law for the court. Probable

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cause was established by testimony introduced by defendant and there was no testimony in the case showing, or tending to show a want of probable cause.

Nor was there any evidence in the case of an abuse of criminal process. Defendant demanded the return of the hose, as he was advised to do by the prosecuting attorney, but there is no testimony that he went further; no testimony that he extorted or attempted to extort any money from the defendants in the criminal case or any of them; no evidence that he in any way used or attempted to use the warrant to procure a settlement from any of the defendants therein named; no evidence that he even mentioned the warrant to them or any of them. All that he did was to demand a return of the property he and his tenants had bought and paid for, and which he honestly believed belonged to them. If this property belonged to them defendant might undertake to recover it, but had no right to use the criminal process of the court in that undertaking. There is no evidence that he did so. The court was not in error in directing a verdict for defendant.

The judgment is affirmed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred.

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J. F. HARTZ CO. *v.* LUKASZCEWSKI.

1. APPEAL AND ERROR—STATUTORY RIGHT OF APPEAL—LEGISLATIVE DISCRETION.

The right to an appeal is and always has been statutory, and does not exist at common law, but is a remedy which the legislature may, in its discretion, grant or take away, and it may prescribe in what cases, and under what circumstances, and from what courts, appeals may be taken; and unless the statute expressly or by plain implication provides for an appeal from a judgment of a court of inferior jurisdiction, none can be taken.

2. SAME—JURISDICTION—WAIVER—CONSENT.

Jurisdiction cannot be conferred by consent or inadvertence.

3. SAME—VESTED RIGHT—STATUTES.

The statutory right of appeal is but a mere privilege, not amounting to a vested right, and may be taken away by the legislature before appellate proceedings have been instituted, although judgment was rendered before the statute was amended.

4. SAME—JURISDICTION—DISMISSAL.

Under Act No. 172, Pub. Acts 1917, amending the judicature act (3 Comp. Laws 1915, § 13736), providing that "Writs of error, upon a final judgment or determination, where the judgment exceeds in amount $500, may issue of course, out of the Supreme Court, in vacation as well as in term, and shall be returnable to the same court; and in all other cases such writ may issue in the discretion of the Supreme Court upon proper application," an action begun in justice's court, limited in amount to $500 by plaintiff's declaration and the jurisdiction of the court, and where judgment of "no cause of action" was entered in the circuit, before the statute was amended, and a writ of error was sued out in this court, after said act went into effect, without any application to this court therefor, the Supreme Court is without jurisdiction and will, of its own motion, dismiss the case.

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Error to Wayne; Hosmer, J. Submitted January 17, 1918. (Docket No. 117.) Decided March 28, 1918.

Assumpsit in justice's court by the J. F. Hartz Company against S. J. Lukaszcewski for goods sold and delivered. There was judgment for plaintiff, and defendant appealed to the circuit court. Judgment for defendant. Plaintiff brings error. Dismissed.

Frederic T. Harward, for appellant.

L. A. Koscinski (*Charles Bowles*, of counsel), for appellee.

STEERE, J. Plaintiff brought this action in a justice's court of the city of Detroit to recover a claimed balance due upon a running account extending from November 6, 1909, to February 28, 1912, declaring orally upon the common counts in assumpsit and claiming $500 or under.

Defendant orally pleaded the general issue with special notice of set-off and recoupment. Each furnished a bill of particulars. Plaintiff's comprised a lengthy account for medicines, drugs, surgical instruments, etc., sold to defendant during the period mentioned, with credits for numerous payments thereon from time to time; while defendant's bill of particulars of his claimed set-off was composed of 14 items of "goods returned and not credited," the total stated amount for credits claimed slightly exceeding the balance shown by plaintiff's bill to be yet due on the account. The principal matter in controversy was an X-Ray machine and its accessories which plaintiff claimed defendant bought, but which he claimed was taken on approval and subsequently returned. The primary and controlling issue between the parties was one of fact.

In justice's court plaintiff recovered a judgment for

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$500 and defendant removed the case by appeal to the Wayne circuit court, where re-trial by jury resulted in a verdict and judgment of "no cause of action." The judgment was entered by the circuit court of Wayne county on January 29, 1917. On October 17, 1917, following familiar practice under former statutory authority, plaintiff's counsel obtained as a matter of right, and of course, issuance of a writ of error without any application to this court therefor. A bill of exceptions with assignment of errors attached was thereafter settled and the case proceeded without objection of opposing counsel to a hearing in this court upon briefs and record.

Jurisdiction cannot be conferred by consent or inadvertence. By Act No. 172, Pub. Acts 1917, which went into effect in August, 1917, section 1 of chapter 50 of the judicature act (section 13736, 3 Comp. Laws 1915), is amended to read as follows:

"Writs of error, upon any final judgment or determination, where the judgment exceeds in amount five hundred dollars, may issue of course, out of the Supreme Court, in vacation as well as in term, and shall be returnable to the same court; and in all other cases such writ may issue in the discretion of the Supreme Court upon proper application."

Although judgment was rendered before the amendment was passed, appellate proceedings had not been instituted in this court before it went into effect. Its restrictions were therefore in force and applicable, for the reason that the previous statutory right of review in such cases was but a mere privilege not amounting to a vested right beyond legislative control. *Puffer* v. *Kennedy*, 49 Kan. 59; *Skoin* v. *Limerick*, 50 Kan. 465; *Kendall* v. *Spradling*, 54 Ky. 33; *M'Gruder* v. *Lyons*, 48 Va. 233; *Yznaga del Valle* v. *Harrison*, 93 U. S. 233.

In *Skoin* v. *Limerick*, *supra*, it appeared from the record that judgment was rendered by the trial court

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on January 30, 1889, for review of which the petition in error and case-made were filed in the appellate court on January 13, 1890. On March 20, 1889, an act of the legislature limiting appellate jurisdiction to sums exceeding the amount of the judgment took effect. No question of jurisdiction was raised by either party. It was there said:

"We think, however, it is the duty of this court on its own motion, where the question is not otherwise raised, to raise the question itself, and to consider the same."

The case was thereupon dismissed under previous decisions referred to.

Not only is the subject matter of the action limited in amount to $500 by the *ad damnum* clause in plaintiff's declaration and the jurisdiction of the court in which suit was begun, but specifically and palpably it is not a case "where the judgment exceeds in amount five hundred dollars," which is the test now prescribed by statute for a writ of error as a writ of right on final judgment in the trial court.

That no right of appeal exists in this State except as conferred by statute, is well settled. *Harvey* v. *Pealer*, 63 Mich. 573; *Sullivan* v. *Haug*, 82 Mich. 548; *Messenger* v. *Teagan*, 106 Mich. 654. Public policy enters into consideration of the question (*Smart* v. *Howe*, 3 Mich. 590), and it is within the power of the legislature to determine to what extent that right shall exist and under what restrictions. In *Sullivan* v. *Haug*, *supra*, which discusses the subject at length, it is said:

"The right to an appeal is and always has been statutory, and does not exist at common law. It is a remedy which the legislature may, in its discretion, grant or take away, and it may prescribe in what cases, and under what circumstances, and from what courts, appeals may be taken; and unless the statute expressly or by plain implication provides for an ap-

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peal from a judgment of a court of inferior jurisdiction, none can be taken."

The case is therefore dismissed from this court, without costs to either party.

OSTRANDER, C. J., and BIRD, MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

BOLTON *v.* CUMMINGS.

1. APPEAL AND ERROR—STATUTORY RIGHT OF APPEAL—LIMITATION—JURISDICTION.

   The right of appeal is statutory, and unless taken within the time fixed by the statute the appellate court does not acquire jurisdiction.

2. SAME—JURISDICTION—WAIVER—CONSENT.

   Jurisdiction is not acquired by waiver or consent.

3. SAME—DISMISSAL.

   Where a writ of error was not taken out until after the expiration of a year from the rendition of judgment, and no motion for extension of time was made, and no extension was granted by the Supreme Court or by any of the Justices thereof, the Supreme Court should, of its own motion dismiss the case for want of jurisdiction. 3 Comp. Laws 1915, § 13741.

Error to Kent; Lamb, J., presiding. Submitted January 30, 1918. (Docket No. 106.) Decided March 27, 1918.

Case in justice's court by George W. Bolton against Harwood Cummings for trespass. From a judgment for plaintiff, defendant appealed to the circuit court.

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Judgment for defendant. Plaintiff brings error. Dismissed.

Thompson & Temple, for appellant.

Hatch, McAllister & Raymond, for appellee.

PER CURIAM. A judgment for the defendant was entered in this case June 21, 1916, in the Kent circuit court. August 9, 1917, the writ of error was issued. No motion for an extension of time to take out such writ was made, and no extension of time was granted by this court, or by any of the Justices thereof. The year in which a writ of error might issue without such extension had expired. No motion to dismiss the writ has been filed, and appellee files a brief on the merits. The right of appeal is statutory; unless taken within the time fixed by the statute the appellate court does not acquire jurisdiction; jurisdiction is not acquired by waiver or consent. Section 13741, 3 Comp. Laws 1915; *Riley* v. *Railway*, 163 Mich. 327. This court should, of its own motion, dismiss a case which the record discloses it has not the jurisdiction to hear and determine. *J. F. Hartz Co.* v. *Lukaszcewski, ante*, 230.

The writ of error will be dismissed.

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YOUNG *v.* YOUNG.

1. EQUITY—WILLS—INCONSISTENT CLAIMS.
   Where plaintiff in his bill prayed that a will, under which he obtained title to land, be sustained as to the validity of his title, but otherwise be set aside, his position was inconsistent; he cannot elect to accept what is favorable to him and at the same time reject it for other purposes.

2. ESTOPPEL—WILLS—ELECTION.
   Where plaintiff, more than two years after learning of his rights under a second will, deeded land with full covenants of warranty, basing his right to convey under the first will, his action was an election amounting to an equitable estoppel.

3. LIMITATION OF ACTIONS—RIGHTS IN LAND—WILLS—PROBATE.
   Where the first will had been probated for more than 15 years and plaintiff waited for more than two years after learning of his rights under the second will before beginning proceedings, his right to recover, not only the lands but also funds received upon its sale, was barred by the provisions of section 12311, 3 Comp. Laws 1915.

4. SAME—EQUITY PRACTICE.
   The court of equity will usually apply the principles of a statute of limitations by analogy.

5. EQUITY—PRIVITY OF ACTION—ESTOPPEL.
   There being no privity between plaintiff and defendant in respect to the cause of action, the fact that plaintiff is precluded by his own acts in proceeding against the vendee of the land affords no argument for the propriety of his inconsistent claims in this proceeding.

Appeal from Kent; Perkins, J. Submitted January 30, 1918. (Docket No. 46.) Decided March 27, 1918.

Bill by W. Crawford Young against Ella O. Young to set aside the probate of a will, to establish a later will, and for an accounting. From a decree dismissing the bill, plaintiff appeals. Affirmed.

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Jewell & Smith, for plaintiff.

Taggart & Kingston, for defendant.

On November 18, 1891, David J. Young, being then seised of a farm containing 220 acres, made a last will and testament by the terms of which he devised his entire estate, including said farm, to his wife, Ella O. Young. David J. Young died March 11, 1893, and on March 27, 1893, his will was presented for probate in the probate court. Willis Young, a brother of David J. Young, contested the probate of said will, but it was nevertheless admitted to probate on April 29, 1893. Thereafter, and on June 10, 1893, Willis Young filed a claim of appeal from said order in the circuit court for the county of Kent. On August 2, 1893, Ella O. Young entered into an agreement with Willis Young, by the terms of which said appeal was to be dismissed and she was to sell to said Willis Young the 220 acres of land in question for the sum of $11,000. A stipulation for the dismissal of said appeal was filed and an order entered in accordance therewith upon said 2d day of August, 1893. Later Ella O. Young as administratrix carried to a conclusion the administration of said estate and was duly discharged as such administratrix on February 15, 1894. In the meantime, and on August 15, 1893, Ella O. Young had deeded, with full covenants of warranty to Willis Young, said farm, and he had paid to her the full consideration agreed upon, $11,000. In 1906, Willis Young deeded to his son, W. Crawford Young, the plaintiff herein, 146 acres of the 220 acres purchased by him from Ella O. Young, the defendant, in 1893.

On March 11, 1913, a paper purporting to be the last will of David J. Young was discovered in Los Angeles, California, dated November 27, 1891, nine days later than the will which had been probated in 1893. This will was offered for probate June 11, 1914,

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by plaintiff and probate thereof denied December 18, 1914. By the terms of the second will defendant, Ella O. Young, was given a life estate only in the 220-acre farm in question, with remainder over to W. Crawford Young (nephew of David J. Young), plaintiff herein. On March 16, 1915, plaintiff conveyed with full covenants of warranty a portion of said 146 acres to Carl D. Young for a consideration of $9,000. This deed was made more than two years after the discovery of the second will. The bill of complaint was filed on January 13, 1916, nearly three years after said discovery. The bill sets up the facts as above narrated, together with others bearing thereon, and prays for the following relief:

"(*a*) That the said will of November 27, 1891, may be proved and determined to be the last will and testament of the said David J. Young and entitled to admission to probate as such.

"(*b*) That the will of November 18, 1891, and all orders and proceedings based thereon be set aside and held for naught insofar as so doing will not disturb any title based thereupon.

"(*c*) That the value of the interest of your orator in said lands so devised to him at the death of said David J. Young, and later sold by the said Ella O. Young, may be determined, and the said Ella O. Young be required to account to your orator for the moneys belonging to your orator and so received by her as aforesaid.

"(*d*) That the said Ella O. Young may be decreed to pay to your orator such sum as this court shall determine to have been the value of your orator's interest in said lands at the time of the death of David J. Young, with interest thereon from August 15, 1893; or that the sum of eleven thousand dollars (the price of said lands received by said Ella O. Young) be set aside either in property or money, of the lands or property of said defendant, Ella O. Young, in such manner as the court shall direct, the use thereof to be paid under the direction of this court to the said Ella O. Young, during her life, and upon her death the principal fund to be delivered and paid to your orator."

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The answer denies the genuineness of the second will, admits the proceedings had under the first will and the receipt by defendant from Willis Young of the sum of $11,000 as the purchase price of said 220 acres of land. A motion to dismiss in the nature of demurrer is attached to said answer. This motion is based upon many legal propositions which defendant urges as fatal to plaintiff's claim. The case was heard in open court, the testimony offered all bearing upon the genuineness of the signature of David J. Young to the later will. The learned circuit judge before whom the case was heard found as a matter of fact that the second will was genuine, and found as a matter of law:

"That neither the statute of limitations nor the doctrine of estoppel have anything to do with the determination of this case."

He further held:

"Again, the plaintiff relies upon the validity of his title to the land, and has sold a portion thereof for $9,000. He insists upon his rights to retain the rent and income thereof, and claims, also, an interest as remainderman in the proceeds of the sale by the life tenant made some 24 years ago, under a mutual mistake of fact. While the interest on the proceeds of the sale in the hands of the defendant might, under proper circumstances, be considered in the nature of the setoff against the rents and profits so received by the plaintiff, still, there is no proof before the court as to the amount of such rents and profits.

"I apprehend that before any equitable adjustment of the respective rights of these parties should be attempted, they should each be placed in a situation approximating at least the situation they would have been in had no mutual mistake been made, at least so far as the circumstances will permit. Admitting the authenticity of the second will and allowing it, necessarily nullifies all the preceding actions of these parties in relation to these lands and the proceeds thereof, so far as their individual rights and interests are con-

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cerned. The rights of third parties, however, are not involved. The plaintiff and the defendant have, in a sense, been a trustee each of the other, and before either can ask equitable relief, the other party must be placed upon an equal footing with the claimant. In other words, all acts of each resulting from the mutual mistake, must be regarded as of no lawful effect, and each placed so far as possible *in statu quo*, to the end that their relative rights may be properly adjusted. Here the plaintiff insists upon holding the land and upon his right to dispose of it, or any portion thereof, for any price he may get. He also insists upon retaining the rents and profits for the twenty and more years he has occupied the premises, and makes no effort to return or account for them or any part thereof. He insists upon the proportionate share of a remainderman in the proceeds of the sale made by the defendant to his father, and the interest thereon for something like 24 years, but offers no proof as to the amount of the rents and profits he has received,"

and dismissed plaintiff's bill with costs. From this decree plaintiff appeals.

BROOKE, J. (*after stating the facts*). Assuming that the learned circuit judge was correct in holding that the second will was in fact the last will and testament of David J. Young, and likewise assuming that equity has jurisdiction in the premises (*In re Butts Estate*, 173 Mich. 504, and cases cited), there yet remain several reasons in our opinion why plaintiff cannot succeed in this action. His second prayer for relief is:

"That the will of November 18, 1891, and all orders and proceedings based thereon, be set aside and held for naught insofar as so doing will not disturb any title based thereupon."

In other words, he prays that the first will, which was admitted to probate, may be considered as the last will and testament of David J. Young for the purpose of making a good title to the 220 acres of land which

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Ella O. Young deeded to his father for $11,000, 146 acres of which were deeded by his father to himself and some portion of which he himself deeded with full covenants of warranty to Carl D. Young for $9,000. All these conveyances rest for validity upon the propriety and legality of the proceedings in the probate court which declared the will of November 18, 1891, to be the last will and testament of David J. Young. The positions occupied by plaintiff are inconsistent. He cannot elect to treat the first will as the last will and testament of David J. Young for the purpose of basing his title thereon to a portion of the lands conveyed thereunder, and at the same time elect to consider it invalid for other purposes. In the recent case of *Hawley* v. *Dibble*, 184 Mich. 298, it is said:

"In the instant case the defendants, who are trying to contradict the terms of the deed in this respect are claiming an undivided half interest in the lots by force of the same deed. They do not accept the instrument as a whole. They accept what is favorable. This is just what the *Jacobs Case* holds they ought not to be permitted to do." *Jacobs* v. *Miller*, 50 Mich. 119.

See, also, *Stone* v. *Cook*, 179 Mo. 534, where the rule is announced:

"A person cannot accept and reject the same instrument, or, having availed himself of it as to part, defeat its provisions in any other part; and this applies to deeds, wills, and all other instruments whatever. [Citing authorities.] This doctrine of election, which prevents the assertion of repugnant rights, is but an extension of the law of equitable estoppel."

In connection with the application of this rule to the case at bar, it must be noticed that plaintiff himself, on March 16, 1915, more than two years after the discovery of the alleged second will, deeded a portion of the 146 acres with full covenants of warranty, basing his right to make such conveyances upon the first will and the probate thereof.

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The judicature act, Act No. 314 Pub. Acts 1915 (3 Comp. Laws 1915, § 12311; Cummins & Beecher, § 434), provides:

"SECTION 1. Hereafter no person shall bring or maintain any action for the recovery of any lands, or the possession thereof, or make any entry thereupon, unless such action is commenced or entry made within the time herein limited therefor, after the right to make such entry or to bring such action shall have first accrued to the plaintiff, or to some person through whom he claims; * * * or through a devise in any will which shall have been probated in this State for fifteen years, during which period no suit in chancery has been brought to test the validity of such devise: *Provided*, That in cases where such fifteen-year period has already elapsed such rights of entry or actions shall be barred after two years from the passage hereof, or in case such right has not accrued, then after two years from the accruing thereof."

This legislation first appears upon the statute books in its present form as Act No. 243, Pub. Acts 1911. With reference to this statute, counsel for appellant say:

"It is apparent that this statute applies only to suits brought to compel a reconveyance or entry upon lands. The plaintiff in this case is not asking for a reconveyance of the land or attempting in any way to make an entry thereon or to affect anybody's title. Technically, it might be said that our bill is divided into two parts: *first*, to have the last will established, and *second*, to recover from Mrs. Young the portion of the money we are entitled to by reason of the devise contained in the last will."

We are of the opinion that this position is not tenable. It is apparent that the $11,000 for which the defendant, Ella O. Young, sold the land stands in place of the land itself, and we think that the statute which clearly bars recovery of the land should also bar recovery of the fund which was received upon its sale. Plaintiff himself had it within his power to avoid the

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effect of this statute because he learned of the second will within two years from the passage of the act, to wit, March, 1913. A court of equity will usually apply the principles of a statute of limitation by analogy. *In re Sellman's Estate,* 175 Mich. 700; *Hatch* v. *Village of St. Joseph,* 68 Mich. 220; and *Smith* v. *Davidson,* 40 Mich. 632.

Plaintiff in this suit seeks to recover a portion of the purchase price paid to Ella O. Young for the farm in question by a third party. There is no privity between plaintiff and defendant in respect to the cause of action. Assume that defendant had sold the farm to a stranger and that her vendee was now in possession thereof, upon establishing his rights to the reversion in said farm, plaintiff would have a right to proceed against the vendee upon the termination of the life estate. That plaintiff is precluded from taking this course by reason of his own acts in dealing with the title in reliance upon the first will, affords no argument for the propriety of his present claims. In addition to the reasons assigned by the learned circuit judge we are of opinion that the plaintiff's bill might properly have been dismissed upon any of the grounds above set forth.

The decree is affirmed.

BIRD, MOORE, STEERE, FELLOWS, and STONE, JJ., concurred.

OSTRANDER, C. J., and KUHN, J., did not sit.

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In re MERRILL.

1. CONSTITUTIONAL LAW—PROBATE COURTS—LEGISLATIVE POWERS.
   Under section 13, art. 7, Const. Mich. 1909, the legislature is given plenary authority to prescribe the powers and duties of the probate courts and the judges thereof.

2. STATUTES—CONSTRUCTION.
   Where the wording of a statute is absolutely unambiguous, these is no room for construction.

3. CONSTITUTIONAL LAW — PROBATE COURTS — COMMITMENT — DUE PROCESS OF LAW—FEDERAL CONSTITUTION.
   Subdivision 2, section 13765, 3 Comp. Laws 1915, empowering probate judges to issue a warrant and imprison any person who shall refuse or neglect to comply with any order issued by said court, is not in contravention of the 14th Amendment to the Constitution of the United States; said orders being made only after due notice and hearing, it cannot be contended that it is not due process of law.

4. SAME — HABEAS CORPUS — IMPRISONMENT FOR DEBT — PROBATE COURTS—WARRANT.
   Where petitioner in habeas corpus proceedings wilfully refused to comply with an order of the probate court to pay over money coming into his hands as executor of an estate, and the warrant of commitment was issued under section 13765 to enforce said order, it was not an imprisonment for debt in contravention of section 20, art. 2, Const. Mich. 1909.

5. HABEAS CORPUS—STATUTES.
   The words of the statute (subdivision 2, § 13765, 3 Comp. Laws 1915) providing for the arrest and imprisonment of "any person" is broad enough to include executors, and petitioner's contention that the warrant of commitment is illegal and void because in violation of section 12819, 3 Comp. Laws 1915, cannot be sustained.

Habeas corpus proceedings by Herbert W. Merrill to obtain his release from the county jail of Saginaw county. Submitted January 29, 1918. (Calendar No. 28234.) Writ dismissed March 27, 1918.

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G. W. Davis (*Frank A. Rockwith* and *Fred A. Baker*, of counsel), for petitioner.

Weadock & Weadock, for respondent.

BROOKE, J. After full hearing in the probate court for Saginaw county upon matters there in dispute, petitioner and his coexecutors of the last will and testament of William Merrill, deceased, were by an order entered on the 5th day of February, 1915, ordered to pay over to Eric S. Wessborg, as executor of the last will and testament of Alice E. Merrill Wessborg, all dividends collected by him on 41½ shares of the capital stock of Mitts & Merrill amounting on January 1, 1915, to the sum of $3,652.

An appeal from said order to the circuit court for the county of Saginaw was perfected by petitioner, where, after a full hearing, the same was affirmed. From said judgment of affirmance an appeal was taken to this court, where it was again affirmed. *Wessborg* v. *Merrill*, 195 Mich. 556. After the affirmance of said order in this court remittiturs from this court and the circuit court were duly filed in the probate court and on June 12, 1917, a demand was made upon petitioner and his coexecutors that they comply with said order of February 5, 1915. Petitioner and his surviving coexecutor, Eudora B. Merrill, refused and neglected to comply with said order or any part thereof, whereupon, and on the 15th day of June, 1917, a warrant for the arrest of petitioner was issued by the probate judge, under subdivision 2, of section 13765, 3 Comp. Laws 1915. This section reads as follows:

"SEC. 2. Each judge of probate shall have power:

"1. To administer all oaths necessary in the transaction of business before the probate court, and all oaths required by law to be administered to persons executing trusts under the appointment of such court;

"2. To issue all warrants and processes in conformity to the rules of law, which may be necessary to com-

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pel the attendance of witnesses residing in any part of this State, or to carry into effect any order, sentence or decree of the probate courts, or the powers granted them by law, and to issue warrants directed to any sheriff, constable or other proper officer in this State, requiring him to apprehend and imprison any person who shall refuse or neglect to perform any order, sentence or decree of a probate court, requiring such officer to apprehend and imprison such person in the common jail of the county, until he shall perform such orders, sentence or decree, or be delivered by due course of law; and all such officers shall serve and execute all legal warrants and processes to them directed by any judge of probate;

"3. To keep order in his court, and to punish any contempt of his authority, in like manner as such contempt may be punished in the circuit court;

"4. And shall have such other powers as may be conferred by law."

Petitioner thereupon instituted habeas corpus proceedings in the circuit court for the county of Saginaw, where a hearing was had upon pleadings and proofs, after which the learned circuit judge dismissed said writ, holding that the warrant under which petitioner was detained was valid and his arrest and commitment legal. Application was thereafter made to this court for a writ of certiorari to review the decision of the circuit court holding said warrant valid and commitment legal, which application was denied. Later, and on October 2, 1917, petitioner filed a bill in chancery to restrain the enforcement of said warrant. This injunction was denied. Thereupon petitioner caused to be issued a writ of habeas corpus from the United States court for the eastern district of Michigan, northern division, where, after argument, the writ was dismissed. Application was then made by petitioner to the circuit judge for Saginaw county for a writ of error to the Supreme Court of the United States, which was allowed, but, pending the hearing upon said writ, bail was refused by said circuit judge

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on the ground that the imprisonment of petitioner was valid. Petitioner thereupon applied to this court for a writ of habeas corpus, which, out of an abundance of caution and because a citizen was restrained of his liberty, this court allowed, and, pending the determination upon said writ, petitioner was enlarged upon bail in the sum of $20,000. All the antecedent proceedings, which are very voluminous, are now before us, but the issue is a very narrow one.

Assuming, though not determining, that the issuance of the writ was proper at a time when the identical question was pending in the United States Supreme Court upon a writ of error to the circuit court for the county of Saginaw, we come to the basic question involved which is the constitutionality of the act, Subd. 2, § 13765, 3 Comp. Laws 1915.

The first contention of the petitioner is that the issuance of the warrant by virtue of this section and his imprisonment thereunder is unlawful and void as a contravention of section 20, of article 2, of the Constitution of 1909, which provides:

"No person shall be imprisoned for debt arising out of, or founded on a contract, express or implied, except in cases of fraud or breach of trust, or of moneys collected by public officers or in any professional employment. No person shall be imprisoned for military fine in time of peace."

Under this head it is argued that the order of the probate court of February 5, 1915, is, in substance, against the estate of William Merrill, and that, insofar as it mentions the executors of his estate, it refers to them *de bonis testatoris* and not *debonis propriis*, and hence, as a judgment or decree for the payment of money, it is not enforceable against the petitioner or his coexecutor. It is further argued that the money (referred to in the order), was paid to the estate of William Merrill, which, by the decisions of the courts

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respecting the same, it had the right to receive. It was therefore founded on contract express or implied within the meaning of section 20, art. 2, of the Constitution. Attention of the court is directed to the case of *In re Bingham*, 32 Vt. 329, where a similar statute was under consideration and where the court held that the proceeding was irregular and void.

Our Constitution, section 13, art. 7, provides:

"In each county organized for judicial purposes, there shall be a probate court. The jurisdiction, powers and duties of such courts and of the judges thereof shall be prescribed by law, and they shall also have original jurisdiction in all cases of juvenile delinquents and dependents."

It will be noted that by this section the legislature is given plenary authority to prescribe the powers and duties of the probate courts and the judges thereof. In the exercise of this power, the legislature in its wisdom saw fit to enact the law in question. The wording of the act is absolutely unambiguous, and where such is the case there is no room for construction. *MacQueen* v. *City Commission of City of Port Huron*, 194 Mich. 328. By its terms the judge of probate is granted power:

"To issue warrants * * * * to apprehend and imprison any person who shall refuse or neglect to perform *any* order, sentence or decree of a probate court * * * until he shall perform such orders, sentence, or decree or be delivered by due course of law."

The statute confers the authority to issue the warrant upon the judge of probate and does not require its issuance by the probate court. It does not prescribe that notice shall be given before the warrant shall issue or that an order to show cause why it shall not issue shall be made before issuance. Its sole purpose is to enforce performance of the orders, sentences and decrees of the probate court which under our practice are made only after notice and hearing. There is

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therefore no force in the objection of the petitioner that said warrant was issued without an order to show cause or a preliminary hearing. Petitioner was well advised of every step in the proceedings antecedent to the issuance of said warrant. He contested the making of the order, requiring the payment of the trust fund, in the probate court, in the circuit court, and in this court, and after the remittiturs were filed in the probate court, a demand was made upon him to comply with said order. This he refused to do in wilful defiance of the law as it had been established after the most exhaustive examination in the court of last resort in this State. In the light of the history of this litigation, the contention of the petitioner that the statute and the proceedings had thereunder do not afford petitioner equal protection of the law and is not due process of law within the fourteenth amendment to the Constitution of the United States, is untenable. Cooley on Constitutional limitations (7th Ed.), p. 496. *Miedreich* v. *Lauenstein*, 232 U. S. 236.

The imprisonment of the petitioner under the section in question is not imprisonment for debt within section 20, article 2, neither is it imprisonment as for contempt which is provided for in another subdivision of the same section. It was provided as a summary and effective method of enforcing the orders of the court and is applicable to interlocutory as well as to final orders and decrees. The further contention is made that the warrant of commitment is illegal and void because issued in direct violation of section 12819, 3 Comp. Laws 1915, which provides:

"But such execution shall not issue against the body, nor against the goods and chattels, lands and tenements of any executor, administrator, heir, devisee or legatee, unless in those cases specially provided by law,"

and it is asserted that the only cases specially pro-

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vided by law are such as arise in partition proceedings in the probate court. Section 13933, 3 Comp. Laws 1915. We cannot agree with this contention. The section under consideration is the law and provides by its terms for the arrest and imprisonment of "any person who shall refuse or neglect to perform, etc." The words, "any person," certainly include executors, administrators, heirs, devisees or legatees.

It may be said that the history of the litigation giving rise to the present inquiry is such as to afford a rather unusual commentary on the wisdom of the provision.

The writ is dismissed and the petitioner is remanded to the custody of the respondent, the sheriff of Saginaw county.

BIRD, MOORE, STEERE, FELLOWS, and STONE, JJ., concurred. OSTRANDER, C. J., and KUHN, J., did not sit.

BUDD *v.* ANN ARBOR RAILROAD CO.

1. FIRES—RAILROADS—PLEADING—VARIANCE—EVIDENCE—SURPRISE.
   In an action against a railroad company for setting fire to plaintiff's premises by escaping sparks from a locomotive, where the declaration alleged that defendant's track ran so near plaintiff's property that it was possible for sparks to be carried from the engine, properly stating a cause of action, testimony tending to support the inference of improper equipment and operation, from the circumstance of the great distance it was assumed the spark was thrown, was not inadmissible on the ground of variance; the proof offered should have occasioned no surprise to defendant.

2. SAME—EVIDENCE—EXPERT WITNESSES—NEGLIGENCE.
   In such action, testimony of two witnesses, formerly loco-

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motive engineers, although neither had operated an engine for many years, that a properly equipped engine could not throw sparks the distance traveled in the case at bar, was admissible, its weight being for the jury.

3. SAME—EVIDENCE—SPARKS—NEGLIGENCE.

Testimony of witnesses that, while working upon a barn, they had noticed live sparks fall upon the roof, carried a distance of from 150 to 200 feet farther from the track than the barn that was burned, was admissible for the purpose of showing that it was physically possible for sparks to be carried that distance through the air, but not for the purpose of showing that defendant's engines generally caused fires at other times and places.

4. TRIAL—FIRES—EVIDENCE—DIRECTED VERDICT.

The court below was not in error in refusing to direct a verdict for defendant, where the evidence warranted the conclusion that defendant's engine caused the fire, although the evidence that the engine was out of order was based solely upon the testimony of experts that an engine properly equipped and managed would not emit a spark capable of setting fire at the distance in question.

Error to Washtenaw; Kinne, J. Submitted January 18, 1918. (Docket No. 149.) Decided March 27, 1918.

Case by Abraham D. Budd against the Ann Arbor Railroad Company for the negligent burning of plaintiff's buildings. Judgment for plaintiff. Defendant brings error. Affirmed.

Alexander L. Smith, Gustavus Ohlinger and *Cavanaugh & Burke,* for appellant.

Arthur Brown and *John P. Kirk* (*E. R. Sutherland,* of counsel), for appellee.

In this action plaintiff seeks to recover damages growing out of the loss of his farm buildings and contents by fire which he alleges was set by a passing locomotive belonging to defendant, equipped at the time with improper and defective appliances for

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arresting sparks and improperly managed. In the declaration it is alleged:

"That on said date the defendant was the owner of, and was engaged in operating, a railroad in this State by means of steam locomotives, which said railroad then and there ran so near to the said property so owned by the plaintiff that it was possible for sparks from said locomotives to be blown and carried over to and upon the said property."

In his opening statement counsel for plaintiff said that he would show that the straw stack which was ignited stood 453 feet from the railroad track. At the close of said statement counsel for defendant objected to the introduction of any evidence under the declaration upon the ground that it did not state a cause of action. Counsel said:

"Everything Mr. Brown in his statement says he was going to prove, he cannot prove under this pleading he had filed here. In the second paragraph Mr. Brown says that this railroad 'then and there ran so near to the said property of the plaintiff that it was possible for sparks from said locomotives to be thrown over to and upon said property.' In other words, that the track was so near that an engine, in proper order and properly operated, would throw sparks over onto that property, because it was so near, as he alleges in his declaration. The proof he intends to make, according to his opening statement, cannot come under that pleading, because under his opening statement he says he proposes to show, not that the property was so near, but that it was so far away that it was impossible to throw sparks unless the engine was in bad condition, and that is exactly contrary to what he had pleaded; and he must amend his declaration before he can make his proofs conform to his opening statement; if he asks for that we shall ask for a continuance of this case."

The court reserved ruling, permitting the testimony to go in and afterwards in effect overruled the objection upon which defendant assigns error. The circum-

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stances under which the fire occurred are, briefly, as follows:

On September 23, 1916, at about 12 o'clock noon, plaintiff and the other members of his household had dinner. Immediately after dinner all the members of the household, including plaintiff, left the premises with the exception of Francis Jones, a boy between 11 and 12 years of age whose father and mother were plaintiff's tenants and lived in the house with him. No fire was used in or about the house except in an oil stove. Immediately after dinner, Mrs. Jones and her daughter went to town, leaving the little boy, Francis, with instructions to wash the dishes. This he did, consuming about 20 or 25 minutes in the labor, and, desiring a drink, he took a pail and went to the well located between the house and barn, and while in the act of pumping a pail of water he noticed a fire in the straw stack about 10 feet from the ground. He took the pail of water and endeavored to quench the fire, but was unable to do so. He then ran to the railroad track and called some section men who were likewise unable to extinguish the fire, but who did remove some of the contents of the barns. The plaintiff was working in a field nearby, and himself observed the fire in the stack before it was communicated to the barns. Both the plaintiff and the boy, Francis Jones, noticed a train going past the barn buildings a few minutes before the fire was discovered. The train was said to be heavily loaded with coal and working hard, with black smoke coming from the stack. There was a strong wind blowing from the west, plaintiff's barn buildings being located 453 feet east of the track. There had been a long spell of dry weather prior to the 23d day of September, though plaintiff testified that there had been a shower a day or two before. One witness testified to seeing this freight train pass heavily loaded and working hard; that with-

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in 10 or 15 minutes afterwards he noticed a heavy smoke in the neighborhood of Pittsfield Junction and got a telephone message to the effect that plaintiff's barns were burning; that at about the same time he saw two other fires farther north along the east side of the track. Plaintiff offered as an expert, the witness, Spokes, who testified that he was then superintendent of the Ann Arbor waterworks, but that he had been a locomotive engineer working for the Ann Arbor railroad for a period of from 5 to 10 years, a good many years ago; that he understood the construction of locomotive engines and described the apparatus for the prevention of the throwing of sparks. He was asked the following question:

"*Q.* If a locomotive engine, drawing a heavily loaded freight train up that grade, laboring hard to make the grade, with a strong wind blowing from the west, if the spark arrester and appliances in the smokestack were in good order, whether or not it would be possible to throw out sparks having sufficient life to kindle a fire in a straw stack 453 feet east of the track, the wind being from the west?"

Counsel for defendant objected to the question for the following reasons:

"1. This witness has not run a train for 25 years, and at the time he was engaged in operating locomotives they used a different type of spark arrester from that used at the present time. There is no showing that he ever operated an engine such as it is claimed set this fire.

"2. There is no showing as to the distance of this stack from the track.

"3. Further, this is an attempt to introduce evidence directly at variance with their declaration; it is an attempt to show that this track was so far away that the fact of the communication of the fire there showed improper equipment of the locomotive or improper operation of it.

"4. Further, there has been no showing here yet that this locomotive set this fire."

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The objection was overruled and the question was answered in the negative.

Another expert witness, one Loveland, was sworn for plaintiff, who testified that he was a locomotive engineer for 18 or 20 years, but had not run a locomotive since 1892. The following question and answer were permitted:

"*Q.* If an engine is properly equipped with a spark arrester in good order and under proper management, will it throw out a live spark which will carry vitality and life for a distance of 453 feet and set fire to a straw stack?

"*Mr. Ohlinger:* I object to his answering for the reason that he has not been shown competent to answer. His experience was with the type of arresters known as the cone, and he quit engineering about twenty years ago. The hypothetical question does not include anything in regard to the construction of the engine at the present time, nothing about the construction of the engine which it is claimed set this fire. Furthermore, we claim this question is not proper under the pleadings here, especially as made in the second paragraph of the declaration. Furthermore, there has been no proof of the distance.

"*The Court:* He may answer.

"*A.* No, sir."

Two witnesses, Elwood Rogers and Lance Rogers, were permitted to testify, over objection, that when they were building a new barn for plaintiff, located from 160 to 175 feet farther from the track than the old barn, they had observed cinders and live coals from passing engines fall upon the roof of said barn, and that such cinders had sufficient vitality to set fire to a straw stack.

At the close of the plaintiff's case a motion to direct a verdict in favor of the defendant was made, upon the ground that there was no evidence tending to show that the fire was set by the company and no evidence to show disrepair of the engine. This motion being denied, defendant introduced the evidence of the train

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dispatcher of the defendant company. He was able from his sheets to identify the train which passed plaintiff's premises at the hour in question as train No. 71, engine No. 102. The evidence of one Edward Corcoran was then introduced who testified that he was inspector of the fronts of engines. On direct examination he testified that he inspected engine No. 102 on *Oct. 22, 1916,* and that he found the smoke stack, netting, ash-pan and grates in first-class condition. On cross-examination he fixed the date of this examination as *Sept. 22, 1916.* The date of this inspection given upon direct examination is probably erroneous. The motion for a directed verdict was again renewed and denied and the case was submitted to the jury who rendered a verdict in favor of the plaintiff for the sum of $1,000.

BROOKE, J. (*after stating the facts*). Counsel for defendant in this court assert that they rely upon errors as follows:

1. In the introduction of evidence.
2. In overruling defendant's motion for a directed verdict in its favor.
3. In refusing to give to the jury proper instructions requested by the defendant.

It is urged by counsel for defendant that inasmuch as plaintiff's declaration alleged that:

"Said railroad then and there *ran so near to the said property* so owned by the plaintiff that it was possible for sparks from said locomotive to be blown and carried over to and upon the said property,"

the plaintiff should not be permitted to offer any proof because:

"The proof he intends to make, according to his opening statement, cannot come under that pleading, because, under his opening statement, he says he proposes to show, not that the property was so near, but that it was so far away that it was impossible to

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throw sparks unless the engine was in bad condition, and that is exactly contrary to what he had pleaded; and he must amend his declaration before he can make his proofs conform to his opening statement; if he asks for that we shall ask for a continuance of this case."

In this connection it is argued that testimony as to the distance from the track to the straw stack and all testimony tending to support the inference of improper equipment and operation from the circumstance of the great distance it was assumed the spark was thrown was inadmissible:

"On the ground that the declaration laid stress upon the *nearness* of the point of ignition, but made no claim as to *excessive distance.*"

We are unable to grasp the force of this argument. The declaration averred that the property destroyed was within the possible radius of flying sparks; that the fire was caused by sparks from defendant's engine and that said engine was improperly equipped and improperly managed. We think the declaration stated a cause of action and that the proof offered thereunder should have occasioned no surprise to defendant.

It is next argued that error was committed in permitting the witnesses, Spokes and Loveland, to testify that an engine properly equipped could not throw sparks capable of setting a fire a distance of 453 feet. The objection to the testimony of these witnesses is based upon the fact that neither had operated a locomotive engine for many years. The evidence of these witnesses was admissible under the authority of *Union Ice Co.* v. *Railway Co.*, 178 Mich. 346; its weight was for the jury.

Error is assigned upon the admission of the two witnesses, Rogers, to the effect that in November or December while building a new barn they had noticed live sparks fall upon the roof of said barn a distance

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from 150 to 200 feet farther from the track than the location of the barn that was consumed. On this point defendant relies upon the case of *Ireland* v. *Railroad Co.*, 79 Mich. 163, where it is said:

"Where the particular engine is known and designated, it is not competent to show generally that the defendant's engines have caused fire at other times and places."

This testimony was not offered for the purpose of showing that defendant's engines generally caused fires at other times and places, but was offered for the purpose of showing that it was physically possible for sparks to be carried that distance through the air. For this purpose it would seem the testimony was admissible. *Hoskinson* v. *Railroad Co.*, 66 Vt. 618; *Matthews* v. *Railway Co.*, 142 Mo. 645; *Dunning* v. *Railroad Co.*, 91 Me. 87; *Grand Trunk Ry. Co.* v. *Richardson*, 91 U. S. 454; *Black* v. *Railroad Co.*, 122 Iowa, 32; *Cincinnati, etc., R. Co.* v. *Winkle*, 148 Ky. 726.

Error is assigned upon the action of the court in refusing to direct a verdict for the defendant upon the ground that the testimony showed without contradiction that engine No. 102 on the day of the fire was in proper condition and there was no evidence tending to show that it was improperly operated. In *Potter* v. *Railway Co.*, 157 Mich. 216, we held that where the defendant offered testimony tending to show that the engine was in good order and properly managed which was not directly controverted, where expert witnesses gave evidence tending to show that an engine in good order and properly managed would not throw live sparks across the distance claimed, a question of fact was raised for the determination of the jury.

The evidence contained in this record certainly warrants the conclusion that defendant's passing engine caused the conflagration. While the evidence that the

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engine was out of order was based solely upon the fact that the fire was set at the distance named and the evidence of the experts that a properly equipped and properly managed engine would not emit sparks capable of setting fire at such a distance, we think such evidence sufficient to support the verdict of the jury.

The judgment is affirmed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred.

O'DELL v. DAY.

1. REPLEVIN—FIXTURES—RIGHT TO POSSESSION—DIRECTED VERDICT.
   In an action of replevin for machinery removed from a grape juice plant by defendant, mortgagor, where the evidence was undisputed that the mortgages upon the farm, the foreclosure of which gave plaintiff the right to possession of the realty, did not cover the personal property, which was in no way affixed to the freehold, and that, on the day the writ of replevin was issued, as between plaintiff and defendant, defendant was entitled to the possession of the property, a verdict should have been directed in his favor.

2. SAME—CORRESPONDENCE—ADMISSIONS—EVIDENCE—TITLE TO PERSONALTY—RIGHT TO POSSESSION.
   Correspondence between plaintiff and defendant, after the foreclosure of the mortgages, in which defendant apparently admitted plaintiff's ownership of the personal property, cannot be construed as a surrender either of title or the right to possession of the property by the defendant.

Error to Van Buren; Tucker, J., presiding. Sub-

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mitted January 17, 1918. (Docket No. 122.) Decided March 27, 1918.

Replevin by Benjamin F. J. O'Dell against James Ingersoll Day. Judgment for plaintiff. Defendant brings error. Reversed.

W. J. Barnard, for appellant.

Glenn E. Warner, for appellee.

The defendant was the owner of a farm of 85 acres in the county of Van Buren upon which there was located a grape juice plant. Prior to 1912 he had executed three several mortgages covering said land to the First State Bank of Decatur. On June 7, 1912, he executed to plaintiff a fourth mortgage in the sum of $8,000 covering the same property. After describing the real estate embraced within the terms of the mortgage the instrument proceeds:

"To have and to hold the same, together with all and singular the tenements, hereditaments, privileges and appurtenances thereunto belonging, or in any wise appertaining; and also, all the estate, interest, and claim whatsoever, in law as well as in equity, which the said party of the first part has in and to the premises hereby conveyed, unto the said party of the second part, his heirs and assigns, and to their only proper use, benefit, and behoof forever."

One of the mortgages given to the First State Bank of Decatur was foreclosed by the bank and redemption from said foreclosure was effected by the plaintiff on the 14th day of December, 1915. On December 15th, defendant wrote the plaintiff as follows:

"*My Dear Mr. O'Dell:* I understand from Warner that you have redeemed the mortgage. I regret very much that I could not do it myself. As you are now the owner of the property I want you to know that I am now making every preparation and effort to leave as quickly as possible and in the meantime will protect

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the property the same as if it was my own. I am glad that you were able to protect your interest besides relieving my bondsmen.

"Yours very respectfully,

"JAMES INGERSOLL DAY."

A second letter, undated in the record, follows:

"*My Dear Mr. O'Dell:* As I told you this afternoon I am anxious to go away and let matters stand for a few days and will assure you that in my absence nothing will be done one way or the other. I would like very much to have an authority from you to give a neighbor full charge in my absence of what consists of the entire property.

"With sincere personal regards I am,

"Yours very respectfully,

"JAMES INGERSOLL DAY."

And later a third letter:

"DECATUR, MICHIGAN, December 23, 1915.

"*My Dear Mr. O'Dell:* I am in receipt of your letter and have turned it over to a responsible party giving him full authority to order any one off the place in my absence. I have also seen Mr. Wood and told him that I have nothing to report and that matters should remain as they are until my return, which he said would be O. K. I told him my agreement with you and I had nothing to say as I felt I needed a rest assured that matters will rest just as I said they would until my return. You will hear from me shortly either in person or by letter and it is my wish and hope that matters can be arranged to the satisfaction of all.

"With sincere personal regards, I am,

"Yours very respectfully,

"JAMES INGERSOLL DAY."

It appears that at the time the $8,000 mortgage was executed by defendant to plaintiff, the grape juice plant was equipped with machinery. It further appears that some new machinery was purchased by defendant on contract some two years later, in 1914. Shortly after the correspondence above set forth, defendant, who apparently still remained in possession of the farm

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and plant, undertook to, and did, remove from said plant practically all the machinery and appliances used in the manufacture of grape juice and located in said plant. Much of the machinery was very heavy and it required some days to accomplish its removal from Decatur to Lawton. As soon as plaintiff learned of defendant's acts in the premises, he caused to be issued a writ of replevin covering the property so removed. Much of the property covered by the writ was recovered and returned by plaintiff to the plant at Decatur. Some property was not recovered. It is asserted by plaintiff's counsel, though upon this point the record is silent, that plaintiff since the institution of this suit, has adjusted the claims of the vendors of such machinery and appliances as were held by defendant under contract or lease. The case was tried before a jury who rendered a verdict in favor of the plaintiff and assessed plaintiff's damages, by reason of the expense incurred in returning the property to the possession of the plaintiff, and damages resulting from failure to find and return property to which plaintiff had the right of possession, at the sum of $624. A motion for a new trial having been made, the court refused the same on condition that plaintiff remit $400 from his recovery.

BROOKE, J. (*after stating the facts*). The real question involved in this case is whether the plaintiff, on the day the writ of replevin was issued, was entitled to the possession of the property taken upon the writ. Recognizing this, the learned circuit judge charged the jury in part as follows:

"2. One of the questions in the case is whether or not all of the equipment of the factory is to be treated as real estate and covered by O'Dell's mortgage. Or, if not all of it, then what portion of it shall be so treated.

"3. So far as the rule applicable to this question is concerned, property thoroughly fastened to real estate

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has been often treated by the courts as personalty, and property quite detached from the real estate has been treated by the courts as real estate, because essential to the operation of the property or plant mortgaged, and because of such an arrangement having been made between the parties. I think the rule to be applied to any given case may be arrived at by an answer to the question: What was the intent of the parties to the case being tried as to its treatment?

"4. And in this case you will ask yourselves this question: What did these parties intend, when the $8,000 mortgage was executed; what was to be the rule as to the treatment of the property placed in the factory that was to be erected, by an understanding between the parties, upon this 85 acres of land in question? And when you have arrived in your own minds as to what you believe the intentions of these parties were, that is the end of your consideration of that proposition. If they intended that all the equipment of the factory was to be treated as a part of the real estate, and property covered by the mortgage, then the defendant in this case cannot be heard to say that he did not own the property and that some one else did own it, as against the man to whom he gave the mortgage.

"5. If the understanding was that all the equipment of this factory was to be treated as a part of the building (as real estate, in other words) and was to be covered by this mortgage, then you are to treat it all as covered by the mortgage and render a verdict for the plaintiff as to all the property taken on the writ, except such as you may find to have been taken, if any, that was not intended to be a part of the equipment or covered by the understanding of the parties in the case; bearing in mind that unless you are satisfied by a preponderance of the evidence that it was to be treated as covered by the mortgage you will find for the defendant as to all property owned by him that was not fastened to the real estate, or a part of it."

Defendant assigns error thereon.

The record, we think, shows without dispute that the property described in the writ of replevin was

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personal property in no way affixed to the freehold. Neither the plaintiff nor the defendant nor any witness for either party testified that in loaning the money, either the bank who took the first three mortgages, or the plaintiff who took the fourth, had any agreement, either verbal or written, with defendant that the mortgage should cover the personal property used in the grape juice plant; nor does it appear that the money was advanced by either of the mortgagees to the mortgagor for the purpose of purchasing equipment for the plant. Neither the mortgage given to the bank which was foreclosed by the bank and from which redemption was made by the plaintiff, nor the mortgage running to the plaintiff himself, contains any intimation that the security covers any personal property. So far as the situation is disclosed by the evidence in this record, it is, we think, plain, that as between plaintiff and defendant, on the day the writ was issued, the defendant was entitled to the possession of the goods replevined. Counsel for plaintiff seem to place some reliance upon the correspondence quoted above. We do not think these letters can be construed as a surrender either of title or the right to possession of the property by the defendant. As we view this record, there was no evidence tending to show that either the plaintiff's mortgage or that given by defendant to the bank which was foreclosed, covered the property in question, it was therefore error to submit that question to the jury. The court should, as requested by counsel for defendant under the testimony as it then stood, have directed a verdict in favor of the defendant.

The judgment is reversed, with costs, and a new trial ordered.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred.

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JERNER v. IMPERIAL FURNITURE CO.

MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—OCCUPATIONAL DISEASE—ACCIDENT—EVIDENCE.

Where the evidence as to the cause of claimant's injury left it open to inference that it might have been caused by infection from a dyeing fluid, in the nature of an occupational disease, or, if caused by an accident, in the nature of an abrasion of the skin, through which the germ entered, there was no evidence as to when or how the accident occurred, in either event an award of compensation under the workmen's compensation law was unauthorized, since occupational diseases are not covered by the act, and in the second event there was no evidence of an accident on which to base the finding of the industrial accident board.

Certiorari to Industrial Accident Board. Submitted January 10, 1918. (Docket No. 38.) Decided March 27, 1918.

Charles Jerner presented his claim for compensation against the Imperial Furniture Company, for injuries received in defendant's employ. From an order awarding compensation, defendant and the Furniture Mutual Insurance Company, insurer, bring certiorari. Reversed.

Francis D. Campau, for appellants.

Charles G. Turner, for appellee.

BROOKE, J. On August 31, 1916, claimant entered into the employ of respondent Imperial Furniture Company, and continued in such employment to September 19, 1916, a period of 20 days. He was employed as a stainer of mahogany furniture. In performing his duties it was necessary for him to com-

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pletely immerse the article to be stained in a tank containing about 50 gallons of water, in which there was held in solution 1½ pounds of carbonate or bicarbonate of soda and 6 pounds of aniline dye. After removing the article from the tank, it was claimant's duty to brush it off with a brush. During the operation it was necessary for claimant to get his hands into the staining liquid. No difficulty was experienced by claimant until the 11th day of September, on which day he testified, "the flesh started to open up on my hands."

The record discloses that gloves were frequently used by the operatives in the staining department, but that none were furnished by the respondent to claimant. Referring to his condition on the 11th, claimant said:

"I didn't feel it hurt very much on the 11th day, but could see a little red spot on there after I washed the hand.

"*Q.* You don't know where you got the little red spot?

"*A.* No, sir, I do not."

Plaintiff's hand grew worse although he continued to work until the 19th, when he was compelled by his condition to stop.

Dr. Sevensma, who saw claimant in September, 1916, testified that at that time claimant's hand was infected by a germ (staphylococcus). He said that he did not associate the infection with aniline dye. In anwer to a question by a member of the arbitration committee, he said:

"*Q.* Would you say the infection came from his employment?

"*A.* Would I say that?

"*Q.* Would you?

"*A.* Why, it might, in the course of his work.

"*Q.* Is it one of the dangers of the work down there?

"*A.* Not necessarily, I imagine, in the staining

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room, unless they scratch their hand accidentally on the wood work.

"*Q.* You say he did have a scratch there?

"*A.* He must have opened the skin somehow to let in the infection.

"*Q.* Infection coming from employment there?

"*A.* Might have been and might have gotten it home.

"*Q.* When you first saw him, only his little finger was affected.

"*A.* Well, the whole hand was involved, but as I remember it, his little finger was where it started, was the most swollen of them all."

This witness further testified that it would be possible for aniline dye to have the effect to crack the hand or chap it. Another witness, a fellow workman, testified that he saw claimant's hand four or five days before he quit work and that, "there was a little scratch or something."

The arbitration committee, before whom the claim was heard, unanimously denied compensation. On appeal to the industrial accident board, they unanimously reversed the finding of the committee on arbitration and allowed compensation at the rate of $6.25 per week during the period of disability.

We are of opinion that the award must be set aside. If the injury to claimant occurred by reason of the character of his work, he is precluded from recovery because the act does not provide compensation for those suffering injury from occupational diseases. The testimony seems to indicate that those engaged in dyeing furniture with mahogany stain frequently suffer from sore hands. If, however, claimant's injury is due, not to the general character of his occupation, but to some accidental occurrence, then the record is entirely barren of any evidence of an accident. If claimant suffered a scratch or abrasion through which the germ entered, the record is silent as to when and how he sustained the accident. The case is clearly

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distinguishable from *Dove* v. *Leather Co.*, 198 Mich. 132, and *Blaess* v. *Dolph*, 195 Mich. 137. In the first of these cases it was held that there was testimony tending to support the conclusion of the board that the claimant inhaled the infecting germs in the course of his employment, whereas in the case at bar the only testimony upon the subject is that the germ infection from which the claimant suffered cannot be associated with aniline dye. In the latter case the germ (streptococcus) which killed claimant's decedent, was clearly traced to a source within his employment.

The award of the industrial accident board is reversed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred.

OCEANA CANNING CO. *v.* KING.

1. EVIDENCE—HEARSAY—CARRIERS—FREIGHT SHORTAGE.
   In an action against a railroad company by the assignee of a claim of the consignee for a shortage of goods, testimony by an agent of the consignee as to what the teamster told him about the number of cases he hauled from the car to the warehouse was inadmissible as hearsay.

2. SAME—TRIAL—APPEAL AND ERROR.
   In view of positive testimony to the effect that the car was delivered to the consignee with the seals unbroken, and the only testimony of the shortage exclusive of the hearsay testimony of the teamster, was a notation made upon the freight bill by defendant's agent without an investigation, it cannot be said that the objectionable testimony does not constitute reversible error.

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3. CUSTOMS AND USAGES—EVIDENCE—NOTICE—APPEAL AND ERROR.
Evidence of consignee's custom with reference to securing from the carrier notations of shortages upon freight bills, in the absence of evidence showing that defendant knew of such custom, while inadmissible, was harmless error.

4. TRIAL—INSTRUCTIONS—BIAS OF COURT.
Where the trial judge, in his charge to the jury, taken as a whole, plainly indicated his bias, it is open to criticism.

5. DEPOSITIONS—APPEAL AND ERROR—EVIDENCE—SAVING QUESTIONS FOR REVIEW.
The card containing the sealed record on arrival of the train at Chicago, part of the official records of the defendant, offered in evidence by defendant and identified by a witness on deposition, who, after identifying it, stated its contents, should have been admitted in evidence, although the card was not attached to the deposition, where no objection was made at the time the deposition was taken.

Error to Oceana; Sullivan, J. Submitted January 25, 1918. (Docket No. 90.) Decided March 27, 1918.

Case by the Oceana Canning Company against Paul H. King and Dudley E. Waters, receivers of the Pere Marquette Railroad Company, for the loss of freight in transit. Judgment for plaintiff. Defendants bring error. Reversed.

Norris, McPherson, Harrington & Waer (*Parker, Shields & Brown,* of counsel), for appellants.

A. S. Hinds for appellee.

BROOKE, J. For a statement of facts involved in this case see *Oceana Canning Co.* v. *King,* 195 Mich. 628. We there held that the question whether the shortage of 100 cases occurred before delivery, or after the car with the seals intact was delivered to the consignee, was one of fact for the determination of the jury under the evidence.

Upon this trial the plaintiff, to sustain his conten-

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tion that the shortage occurred before delivery, offered the testimony of one Harnett, who, over the objection of defendants, was permitted to testify as follows:

"I received a notice from Franklin MacVeagh & Company through the freight house foreman that such a shipment was coming to us, coming to the warehouse, car 74559, 650 cases, and that car didn't come to the warehouse—it was hauled by team to the Pere Marquette Railroad Company and we received 550 cases. Now, that teamster, to the best of my recollection, is a man named Healy. He hauled the whole thing as far as I can remember, and he brought one load, and he said—I think he said he had 98 cases—either 98 or 100, but whatever number he said he had anyhow, he had two cases more on the wagon than he counted, and when he had the shipment completed he told me that a man at the Pere Marquette Railroad Company delivered him 548 cases. I checked in 550 cases and then I went up and made out a receipt to Franklin McVeagh & Company for 550 cases, and pinned the notice on the back of the copy of that receipt. That is all I know about it."

The specific objection to this testimony was that, so far as it related to the statement of Healy, the teamster, it was hearsay. We are of opinion that the objection was well taken and the statement of the witness as to what Healy told him as to the number of cases delivered should have been excluded as pure hearsay. In the light of the fact that the defendants introduced positive testimony to the effect that the car was delivered to the consignee upon the team track with the seals unbroken and that the only testimony contained in the record (excluding the alleged statement of Healy) is based upon the notation of the shortage upon the freight bill made by an agent of the company, we are unable to say that the admission of the objectionable testimony does not constitute reversible error.

Testimony was admitted, over objection, tending to show the custom of the consignee with reference to

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securing from the carrier notations of shortages upon freight bills. While we think this testimony was inadmissible, there being no evidence tending to show that the defendants knew of such custom, its admission would, we think, be harmless error.

Error is assigned upon the charge of the court. We think this charge, taken as a whole, is plainly open to the criticism that it indicates the bias of the learned trial judge who delivered it. More particular reference thereto is unnecessary.

Exhibit "A," offered in evidence by the defendants, should have been admitted. This was a card containing the sealed record on arrival of the train at Chicago. The record was taken at Tracy yard where the car was delivered to the consignee and was a part of the official records of the defendants. The witness who identified the card testified by deposition, and, after identifying it, stated its contents, but the card itself was not attached to the deposition. As no objection was made at the time the deposition was taken, we are of opinion the exhibit should have been admitted. Other assignments require no discussion.

The judgment is reversed, with costs, and a new trial ordered.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred.

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WILCOX *v.* GAUNTLETT.

1. PLEDGES—DEBTOR AND CREDITOR—MONEY DEPOSITED AS SECURITY.
   Where money was deposited by plaintiff with an automobile sales company as security for the performance of a contract, the relation of debtor and creditor was created.
2. CORPORATIONS—LIABILITY OF DIRECTORS — CORPORATE ACT — DIRECTED VERDICT.
   The act of covering money deposited with a corporation as security for the performance of a contract into the general fund of the corporation was a corporate act for which the individual directors were not liable, and in an action against them to recover the money so deposited, the corporation in the meantime having become insolvent, a verdict was properly directed in favor of defendants.

Error to Washtenaw; Kinne, J. Submitted January 24, 1918. (Docket No. 184.) Decided March 27, 1918.

Case by George A. Wilcox against Elon Gauntlett and others for the conversion of a deposit. Judgment for defendants on a directed verdict. Plaintiff brings error. Affirmed.

Baldwin, Alexander & Russell and *F. M. Freeman*, for appellant.

George S. Wright (*Cavanaugh & Burke*, of counsel), for appellees.

BROOKE, J. On October 9, 1913, plaintiff entered into a contract with the Gauntlett Auto Sales Co. by the terms of which said company agreed to supply plaintiff with goods manufactured by the Buick Motor Co. upon certain terms and conditions. Said contract contains the following:

"The receipt of two hundred fifty ($250.00), dollars is hereby acknowledged as a deposit; such deposit,

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however, not to apply on orders or purchase price of cars, but to be retained by the Gauntlett Auto Sales Co. and returned to you at the termination or cancellation of this contract, provided a full and complete settlement of all accounts due the Gauntlett Auto Sales Co. has been made."

At the time the declaration in this case was filed, July 14, 1915, the Gauntlett Auto Sales Co. had become insolvent. It is conceded that upon determination or cancellation of the contract between plaintiff and the Gauntlett Auto Sales Co., plaintiff had made a full and complete settlement of all accounts due from him to said Auto Sales Co. and the $250 deposited with said Auto Sales Co. thereupon became due and payable to plaintiff according to the terms of said contract.

This suit is brought for the recovery of said $250 not against the Auto Sales Co., but against the defendants who were the directors of said company. The court having directed a verdict in favor of defendants, plaintiff reviews the case in this court under a single assignment of error that:

"The court erred in directing a verdict in favor of the defendants and against the plaintiff."

It is the contention of plaintiff that the deposit of $250 by plaintiff with the Auto Sales Co. did not create the relation of debtor and creditor between them; that said deposit was in the nature of a pledge to be used by the company only upon a certain contingency which never arose; that the Auto Sales Co. had no authority to mingle said fund with the general funds of the corporation and that its use by the corporation amounted to a conversion. It is further asserted that such conversion by the corporation through the activity of Gauntlett who was in active charge of its affairs, was made possible through the

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negligence of the other defendant directors whose duty it was to see that this deposit was used only for the single purpose for which it was made, and that therefore they are personally liable. As to the duty of corporate directors plaintiff cites: *Hun* v. *Cary*, 82 N. Y. 65; *Briggs* v. *Spaulding*, 141 U. S. 132, and *Martin* v. *Webb*, 110 U. S. 7. An examination of these cases shows that in each of them the court was considering the duties of directors of banks and in our opinion they are not applicable to the case at bar which involves the duties of directors in an ordinary mercantile corporation.

The question whether the deposit made under the circumstances indicated should be considered simply as a debt due from the bankrupt corporation to the plaintiff or as a pledge seems to be settled upon authority contrary to plaintiff's contention. In the case of *In re Banner*, 149 Fed. 936, a lessee deposited with his lessor, the bankrupt, $5,000, "to be held by the landlord for the punctual payment and performance of the covenants of the lease." The landlord having become bankrupt the lessee prayed for a preferential payment of the $5,000 out of the funds in the hands of the trustee. Disposing of this claim the court said:

"I am unable to perceive that the agreement between Banner and the Riggs Company created anything more than the relation of debtor and creditor."

The case of *Matter of See*, 31 Am. Bankr. Rep. 360, is to the same effect. It is stated in the headnote:

"One who entrusts money to another to be held as security has not a preferred claim on the assets which come into the possession of the trustee in bankruptcy of that other in case the latter wrongfully appropriates the funds held in security to the payment of certain of his creditors, and they cannot be traced into any specific fund."

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See, also, *In re Hosie*, 7 Nat. Bankr. Reg. Rep. 601.

In the case at bar, plaintiff deposited his money with a legal entity known as the Gauntlett Auto Sales Co. That company instead of retaining his deposit in a special account, so preserving its identity, covered it into its general treasury and doubtless used it in its business. Whether this act was done by Gauntlett and the other defendants, directors of the corporation, or by Gauntlett alone without their knowledge, the act was nevertheless a corporate act and not one of the individual. No personal liability of the directors arose under the circumstances and the verdict in their favor was properly directed.

The judgment is affirmed.

OSTRANDER, C. J., and MOORE, STEERE, FELLOWS, and STONE, JJ., concurred. BIRD and KUHN, JJ., did not sit.

TARPPER v. WESTON-MOTT CO.

1. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT — PERSONAL INJURIES — "OUT OF EMPLOYMENT."

   To entitle an injured employee to compensation under the workmen's compensation act, the injury must arise out of, as well as in the course of, his employment.

2. SAME — INJURY ARISING OUT OF EMPLOYMENT — LIABILITY OF MASTER.

   An injury to an employee, caused by his fellow employees injecting compressed air into his rectum in a spirit of fun, did not arise out of his employment so as to render the master liable under the workmen's compensation act.

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Certiorari to Industrial Accident Board. Submitted January 15, 1918. (Docket No. 87.) Decided March 27, 1918.

Michael Tarpper presented his claim for compensation against the Weston-Mott Company for injuries received in defendant's employ. From an order awarding compensation, defendant and the New England Equitable Insurance Company, insurer, bring certiorari. Reversed.

Frank J. Riggs, for appellants.

Samuel G. Thompson, for appellee.

BROOKE, J. Claimant at the time of his injury was employed by respondent as helper to a riveter. At the time of his injury, claimant and his riveter were engaged in assembling housings for rear axles. It was his duty to put the rivets in the holes that were to be riveted and to hold the case steady on the block while the riveter applied a hammer operated by compressed air to the rivets and so finished the job. Claimant performed no duty which required him either to use or come in contact with the compressed air system or hose. While the claimant was engaged in holding a case upon the block and his riveter was applying the hammer, a fellow employee named Congdon, either innocently or maliciously, committed an assault upon the claimant which he, Congdon, describes in the following manner:

"I walked over to where Mike Tarpper was working and put my arm around his waist. There was an air hose three or four feet away and in the *spirit of fun* I took hold of the hose which was dead (that is, no air was on), and placed it against his side, and in his moving around the hose slipped down until it got against his rectum. I don't know how long I held it there, but in the meantime a man by the name of

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Thompson turned the air on. I did not know any air had been turned on, that is I could not tell by the hose, or by any other means that there was air on. I know that Thompson was standing on the block by the air valve where it is turned on when wanted. Tarpper sank down on the floor and stated that I had hurt him where I held my hand on his side. We all had a habit of fooling around at different times. There was absolutely no bad feelings between myself and Tarpper, or between him and the rest of the men in our department."

As a result of the introduction of the compressed air into claimant's rectum, the rectum was ruptured for a distance of five inches. An abdominal operation was performed very soon thereafter and as soon as the abdomen was opened the compressed air escaped. The rectum was repaired and plaintiff made, according to the record, a somewhat indifferent recovery. A claim for compensation was made and denied by the committee on arbitration. Upon review by the industrial accident board, the order of the committee on arbitration denying compensation was reversed and compensation was awarded. The board found:

"(*a*) That the applicant received an accidental injury arising out of and in the course of his employment by the respondent employer.

"(*b*) That the accident was not the result of horseplay or skylarking, or practical joking.

"(*c*) That at the time the applicant was injured he was attending strictly to his work, and was in such a position that he could not see anything that was going on around and about him."

We have examined this record with care and are unable to find a scintilla of testimony tending to support the second finding of the board. Claimant himself on the way to the doctor's office stated that: "They aired me with the air." The only witness sworn who knew exactly what occurred was Congdon who held the hose in position while Thompson turned on the air. This

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he says he did in a "spirit of fun," and adds, "We all had a habit of fooling around at different times." The third finding of the board is amply supported by the proofs. At the moment of the assault claimant was busily engaged about his ordinary work and did not see what was happening. That claimant suffered his injury in the course of his employment is clear, but that it arose out of his employment is denied by respondent. In *Federal Rubber Manfg. Co.* v. *Havolic,* 162 Wis. 341, the supreme court of Wisconsin had under consideration a case identical in principle and nearly so upon the facts with the case at bar. The court there said:

"This court has endeavored to give to the workmen's compensation act a broad and enlightened construction, to the end that it may accomplish to the fullest extent its beneficent purpose. It is to be remembered, however, that this purpose was to compensate for injuries resulting from one class of accidents only, namely, industrial accidents. There is liability only 'where at the time of the accident, the employee is performing service growing out of and incidental to his employment.' Wis. Stat. 1915, § 2394-3, subd. 2. It was held in *Hoenig* v. *Industrial Com.,* 159 Wis. 646, after full argument and consideration, that the injuries covered by the act are such as 'are incidental to and grow out of the employment.' This seems practically to mean the same thing as the expression in the English compensation act, 'arising out of and in the course of the employment.' Under the English act it has been held that accidents resulting from 'larking' or playing with machinery cannot be held to arise out of the employment. *Furniss* v. *Gartside & Co.,* 3 B. W. C. C. 411; *Cole* v. *Evans,* 4 B. W. C. C. 138.

"The Massachuetts act provides compensation for an injury which arises 'out of' the employment, and it was well said by the Massachusetts supreme court in *McNicol's Case,* 215 Mass. 497:

"'The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the

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character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.'

"* * * How injuries resulting from such inexcusable and revolting horseplay as this can be said to be incidental to the employment we are unable to understand. It is equally impossible to understand how it can be said that the claimant at the time of the accident was performing service 'growing out of and incidental to his employment.'"

That the injury suffered by the employee must arise out of the employment as well as in the course of the employment is well settled by our own decisions. *McCoy* v. *Screw Co.*, 180 Mich. 454; *Klawinski* v. *Railway Co.*, 185 Mich. 643; *Clark* v. *Clark*, 189 Mich. 652; *VanGorder* v. *Motorcar Co.*, 195 Mich. 588.

Upon the question of the employer's liability under acts similar in character to our own for injuries sustained by employees while engaged in playing or fooling with each other, see *De Filippis* v. *Falkenberg*, 170 N. Y. App. Div. 153, where the English authorities are reviewed. See, also, *Hulley* v. *Moosbrugger*, 88 N. J. Law, 161, and, also, *Coronado Beach Co.* v. *Pillsbury*, 172 Cal. 682.

The award is reversed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred.

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McMILLAN *v.* SCHOOL DISTRICT NO. 2, PORTSMOUTH TOWNSHIP.

1. PARTIES—INTERVENERS—PRINCIPAL AND SURETY.

   In an action by the trustee in bankruptcy of the contractor against a school district for a balance claimed to be due the contractor for the erection of a school house, the bondsmen of the contractor had such direct financial interest in the outcome of the litigation as to entitle them to intervene under the provisions of section 12362, 3 Comp. Laws 1915.

2. SCHOOLS AND SCHOOL DISTRICTS — EVIDENCE — CERTIFICATE OF ARCHITECT.

   In an action against a school district for a balance claimed to be due for the erection of a school house, certificates made by the architect and the building committee of the school district were properly admitted in evidence; their value being for the jury, under proper instructions.

3. SAME—REBUTTAL—STRIKING TESTIMONY—TRIAL.

   It was not reversible error to strike out the testimony of a witness for defendant, offered after both parties had rested, as to the cost of remedying alleged defects, testified to in their main case, in response to testimony for plaintiff that the structure was completed in accordance with the plans and specifications, although such testimony might well have been received, in the discretion of the trial judge.

4. TRIAL—INSTRUCTIONS.

   There was no error in the charge of the court, of which defendant could complain, where all of its requests were given to the jury, and the charge presented the claims of the contending parties fairly, and, as a whole, preserved the rights of defendant.

5. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

   A motion for a new trial, on the ground of newly-discovered evidence, supported by affidavits of the members of defendant's building committee that they had made a further examination of the building and had become convinced that their testimony given upon the trial was wrong, and that they had been deceived by the contractor and architect, was properly denied.

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6. SAME—WEIGHT OF EVIDENCE.

The court also properly denied a motion for a new trial on the ground that the verdict was against the weight of the evidence.

Error to Bay; Coumans, J. Submitted January 31, 1918. (Docket No. 45.) Decided March 27, 1918.

Assumpsit by Archibald H. McMillan, trustee in bankruptcy of the Valley Mantel & Tile Company, against School District No. 2 of the township of Portsmouth for a balance due on a building contract. Judgment for plaintiff, defendant brings error. Affirmed.

Kinnane & Black, for appellant.

Stoddard & McMillan and *O. W. Baker*, for appellee.

Plaintiff is trustee in bankruptcy for the Valley Mantel & Tile Co., which company, on July 13, 1915, entered into a contract with the defendant for the erection of a school house according to certain plans and specifications agreed upon between the parties. The contract provides that the work shall be done "to the satisfaction of and under the direction of the architect aforesaid"; that payments shall be made from time to time as the work progresses and that:

"Ten per cent. of all estimates to be retained until the final completion, balance is to be paid upon the completion and acceptance by said architect and superintendent, of the entire work."

A building committee had been appointed by said defendant school district and a contract had been entered into by said building committee with the contractor a few days prior to the date of the final contract which was executed by the school board and work had already commenced when the contract was executed on July 13, 1915. The work progressed under the supervision of the architect and the three members of the

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building committee who by agreement among themselves spent two days each of each week in supervising and inspecting the work. The work was to be completed on or before the 15th day of September, 1915, and a penalty of $5 per day was provided for each day thereafter during which the building remained uncompleted, but

"Fire, inclement weather, strikes, accidents or other causes beyond the control of the contractor, will, in the judgment of the architect, be valid cause for the extension of time on this contract."

The building was completed in December and on the 10th of December, 1915, the architect issued his final certificate by the terms of which there appeared to be due to the contractor $535.78 under the contract and $81.88 for extras. The district board of the defendant school district called a special meeting of the legal voters of the district on January 15, 1916,

"To determine what action the district desires the board to take in regard to settling with the contractor or leaving it all with the board to make settlement with the contractor if they can."

At that meeting the electors of the district took a recess for the purpose of examining the completed work and after such examination passed the following resolution:

"Motion made and supported that the board settle with the contractor for $300 if possible. Carried."

At a meeting between the parties and their respective attorneys shortly thereafter the compromise offer of $300 was rejected by the contractor. This offer was never withdrawn and at the time of trial, one of the trustees testified that it was a standing offer. The contractor having become bankrupt and no settlement of the balance alleged to have become due having been made by the defendant school district, this suit was brought by the trustee for the bankrupt. Defendant

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filed a plea of the general issue and gave notice thereunder that it would show that the building had never been completed in accordance with the contract. This notice sets out with great particularity the alleged defects in the building and demands that the several sums, alleged to be necessary to complete the building in accordance with the terms of the contract be allowed to defendant by way of set-off and recoupment.

The trial in the circuit court commenced on the 6th day of June, 1916. On the 2nd day of June an intervener was filed in said cause by Jesse Marande, Richard Hayward and Alfred L. De Waele. These gentlemen by separate counsel set up the fact that they had executed the bond of the contractor, the Valley Mantel & Tile Co., and that a suit upon said bond was then pending against them for labor and materials furnished to said contractor. They alleged that they were interested in the matters and things involved in the litigation and that any sum recovered by the plaintiff in said suit would by right of subrogation come to them and *pro tanto* reduce their liability under the bond. An order permitting the intervention was made by the court and the trial proceeded. A great mass of testimony was introduced upon the question whether the building was completed in accordance with the plans and specifications. At the time of the trial the amount due under the contract and for extras amounted to $681.36. The jury rendered a verdict in favor of the plaintiff for $385.76.

BROOKE, J. (*after stating the facts*). In this court the defendant reviews said judgment under 35 assignments of error which in our opinion do not require individual discussion.

The first 8, the 12th and 13th assignments refer to the action of the court in permitting the bondsmen of the contractor to intervene and to the proceedings in court following said intervention. Section 11, chap.

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12 of the judicature act (Cummins & Beecher, § 485, 3 Comp. Laws 1915, § 12362), is as follows:

"In an action either at law, or in equity, any one claiming an interest in the litigation may, at any time, be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

Section 2 of the enacting clause of the act provides:

"This act is hereby declared to be remedial in character, and as such shall be liberally construed to effectuate the intents and purposes thereof." Act No. 314, Pub. Acts 1915."

This provision of the judicature act has been construed by this court in *Weatherby* v. *Kent Circuit Judge*, 194 Mich. 46.

It cannot be doubted that the bondsmen had a direct financial interest in the outcome of the litigation and this is true whether in the bankruptcy court the whole sum recovered by the trustee should be held to be the property of the bondsmen by right of subrogation or that they were entitled to share in the distribution of the fund so created the same as any ordinary creditor. There was no error in permitting the intervention of which complaint is made.

Assignments 9, 10, and 11 are based upon the action of the court in admitting as exhibits certain certificates made by the architect and by the building committee. It appears to us that these exhibits were properly admitted. Their value as evidence was for the jury under the testimony and proper instructions from the court.

Assignments of error 14-24 are based upon the admission or exclusion of testimony. We find no reversible error therein.

Assignment 20 refers to the testimony of the witness, Van Zaal. In its principal case defendant had offered much testimony tending to show the defective

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character of the construction, but had introduced no evidence tending to show the cost of remedying the alleged defects with the exception of fixing the cost of renewing the basement floor which was placed at $228. Plaintiff thereupon swore many witnesses, including the three members of the building committee, who testified that the structure was completed in accordance with the plans and specifications. After both parties had rested defendant put upon the stand the witness, Van Zaal, who was questioned by defendant's counsel as to the cost of repointing the brick work, which he first placed at from $225 to $250. Later, it appearing that this estimate was intended to cover the entire building, and that he had made no examination of the walls higher than he could reach while standing on the ground, he was permitted to testify that to remedy such of the walls as he had personally examined would cost from $30 to $35. He fixed the cost of putting a tile drain all around the building outside the footings at $50, and the cost of repairing or replacing alleged defective work on the black boards at $15.

All this testimony was admitted over the objection of plaintiff's counsel as not being proper rebuttal and because the items being testified to were not set forth in any bill of particulars and took the plaintiff by surprise and would require the bringing in of testimony on the part of plaintiff. This testimony was finally, on motion of plaintiff's counsel, stricken out by the court. In the discretion of the court this testimony might very well have been received although strictly out of order. We are unable to find reversible error in the action of the court in this respect.

Several assignments of error are based upon the charge of the court. This charge is quite lengthy and presents the claims of the contending parties fairly, and, when considered in its entirety, preserves, we

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think, the rights of the defendant. In this connection it should be said that all requests preferred by the defendant were given to the jury. They were told that they might find for the plaintiff for the full amount of the claim; that they might find for the plaintiff for a lesser sum than for the full amount of the claim; that they might find a verdict of no cause of action or that they might find for the defendant if they concluded that the defects in the building were greater than the amount of plaintiff's claim. In bringing in a verdict for the plaintiff for $385.76 the jury actually allowed defendant on account of the defects, $295.60. Assuming that they allowed the entire sum of $228 for renewing the basement floor, they allowed $67.60 further for other defects, or about a quarter of the entire sum claimed for defective workmanship, even if the testimony of Van Zaal had been considered.

After verdict, a motion for new trial was made based upon newly-discovered evidence. This claim was supported by the affidavits of the three members of the building committee who swore that after the trial they had made a further examination of the building and had become convinced that their testimony given upon the trial was wrong and that they had been deceived during the progress of the work by the contractor and architect. The learned circuit judge in disposing of this motion said with reference to this evidence:

"This to my mind is not newly-discovered evidence, and owing to the fact that it will necessarily be a contradiction of their former testimony it cannot be of any great weight or use in any event."

Of the claim that the verdict was against the weight of the evidence he said:

"As to the ground that the verdict is against the clear weight of the evidence, it is the opinion of the court that the case having been properly submitted to

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the jury, and their finding a verdict for the plaintiff for about one-half of the amount claimed, that this verdict should not be disturbed."

After a careful examination of this record and the assignments of error we must agree with the learned circuit judge.

The judgment is affirmed.

BIRD, MOORE, STEERE, FELLOWS, and STONE, JJ., concurred. OSTRANDER, C. J., and KUHN, J., did not sit.

KROUT v. J. L. HUDSON CO.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—VACCINATION—COURSE OF EMPLOYMENT—LIABILITY OF EMPLOYER.

Where claimant, with her consent, was vaccinated, with other employees of defendant, by an official of the Detroit board of health, at the request of the board, an infection resulting from such vaccination did not arise out of her employment so as to render her employer liable under the workmen's compensation law.

Certiorari to Industrial Accident Board. Submitted January 15, 1918. (Docket No. 67.) Decided March 27, 1918.

Ida M. Krout presented her claim for compensation against the J. L. Hudson Company for injuries received in defendant's employ. From an order awarding compensation, defendant and the Globe Indemnity Company, insurer, bring certiorari. Reversed.

Douglas, Eaman & Barbour, for appellants.

Edward A. Rich (*Russell L. Freyman*, of counsel), for appellee.

BROOKE, J. For some time prior to February 8,

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1916, claimant was employed as a fitter for the J. L. Hudson Co., respondent. On that day a general vaccination of the employees of the J. L. Hudson Co. was performed by Dr. James A. McVeigh, an official of the board of health of the city of Detroit, who acted in the premises at the request of the board of health. He testified that the request of the board of health was communicated to the officers of the J. L. Hudson Co., and those officers through subordinates conveyed the same to the several departments. He said:

"*A.* It was not an order, but a request for their co-operation.

"*Q.* For the co-operation of who?

"*A.* The J. L. Hudson Company to prevent the possibility of smallpox in their institution.

"*Q.* What alternative was offered by the board of health in the event any employee did not wish to be vaccinated?

"*A.* Following our usual procedure in such cases I told them that if any employees who had not been successfully vaccinated, if they were not successfully vaccinated within five years should be excluded from the place of employment for a period to twenty-one days. * * *

"*Q.* In the event that they refused to be vaccinated what was the remedy of the J. L. Hudson Company?

"*A.* The alternative was a twenty-one day lay-off covering the period of incubation of smallpox."

Claimant, together with several hundred other employees, submitted to the operation. It is her claim that within half an hour after the operation she felt pain in her arm extending upwards into her neck, and that this condition continued for four days when she was obliged to discontinue work. Two days later, on February 14, she called a physician who diagnosed her trouble as "acute mastoiditis, lymphatic infection."

He operated upon her on the 19th. Claimant remained in the hospital some two or three weeks and was convalescent for a considerable period thereafter.

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No notice of the accident was served upon respondent and no formal claim for compensation ever made by claimant until January 19, 1917. It is undisputed, however, that the respondent knew of claimant's illness and that one of the nurses connected with the welfare department of the respondent called upon her at her home during her said illness. It is likewise undisputed that some time in June, 1916, claimant called upon the manager of the respondent for the purpose of ascertaining "if they could not do something for me, or what they could do for me."

As a result of this interview claimant was paid two weeks' salary, which, we gather from the record, was in accordance with the usual custom of the respondent company. Respondent having denied liability, an arbitration followed and an award was made, which, upon appeal to the industrial accident board, was affirmed.

Respondent reviews the case in this court asserting that:

"(1) Claimant's injury was not accidental.

"(2) Claimant failed to sustain the burden imposed upon her of showing that the alleged accidental injury arose out of and in the course of her employment.

"(3) Claimant has not discharged the burden of showing that the alleged accidental injury was the cause of her disability."

While Dr. McVeigh, who had himself vaccinated approximately 100,000 persons, testified that he never knew or heard or read of a case of acute mastoiditis being caused by vaccination, it was the opinion of Dr. Williams, claimant's family physician, that the mastoiditis was the result of a lymphatic infection, the germ of which, streptococcus or pneumococcus, found entrance to the system through the vaccination. Asked what he meant by an infected vaccination, he said:

"Any open wound or sore exposed to the air, infection from clothing or any surroundings is liable to become infected. What I mean by that is, a man cut-

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ting a corn and wearing a black sock is liable to get streptococcus or pneumococcus."

Assuming, then, as found by the board, that the mastoiditis was caused by the invasion of the germs through the vaccination wound (though the testimony contained in the record seems strongly to discredit this theory), there is still an absolute lack of evidence tending to show that the germ secured lodgment in claimant's arm in the course of her employment. In this respect the case is distinguishable from *Blaess* v. *Dolph*, 195 Mich. 137, and *Dove* v. *Leather Co.*, 198 Mich. 132. See, also, *Chandler* v. *Railway Co.*, 5 B. W. C. C. 254; *Bellamy* v. *J. Humphries & Sons*, 6 B. W. C. C. 53.

It seems quite clear to us that claimant has failed to show any connection between her employment in the store of respondent and the infection following vaccination. There was nothing in her employment which made her more susceptible to the reception of the germ infection than if she were walking upon the street or attending a theatre or church. In other words, the risk of infection was such and such only as that to which the general public is exposed. Claimant's injury, if it can be traced to the vaccination, arose not out of her employment with respondent, but through the active agency of the Detroit board of health, which, for the benefit of the claimant as well as for the benefit of the general public, requested her to submit to the operation. The right of the board of health to insist upon general vaccination is not involved. Claimant submitted to the operation though she asserts "under protest."

We are not here passing upon the sufficiency of the notice of injury or the claim for compensation.

The award is set aside.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, FELLOWS, and STONE, JJ., concurred. KUHN, J., did not sit.

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VAN DRIEL *v.* STEVENS.

1. MASTER AND SERVANT—PERSONAL INJURIES—COURSE OF EMPLOYMENT—QUESTION FOR JURY.

   In an action for personal injuries by an employee, who had been engaged to assist in filling two silos, received from a fall from a defective ladder leading up to a chute to the top of the silo, where plaintiff, who had been temporarily employed in sharpening a set of knives to be used in the machine, unknown to the employer entered the chute and climbed to the top of the ladder to see if his help was needed in completing the filling of the silo, when he fell and received the injuries sued upon, the question as to whether he was acting within the scope of his employment was properly for the jury, under proper instructions.

2. SAME—EVIDENCE—SELF-SERVING TESTIMONY.

   Testimony of plaintiff as to his reasons for climbing the ladder was not objectionable on the ground that it was self-serving; its weight being for the jury.

3. SAME—DAMAGES—PERMANENT INJURIES—EARNING CAPACITY.

   Where the testimony of the physician showed that plaintiff's injury was of a permanent character, it was not error for the trial court to submit to the jury the question of his decreased earning power, although he testified that, because wages had gone up, he was able to earn, at lighter work, the same wages he received before the injury.

4. APPEAL AND ERROR—CONDUCT OF COURT—TRIAL.

   Language of the trial court, which, if used in the presence of the jury, would have been open to serious objection, *held*, not prejudicial where the jury were not present when it was spoken.

Error to superior court of Grand Rapids; Dunham, J. Submitted January 23, 1918. (Docket No. 168.) Decided March 27, 1918.

Case by Cornelius Van Driel against Harry Stevens for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

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A. C. Hindman (*Ganson Taggart*, of counsel), for appellant.

William J. Landman (*Fred P. Geib*, of counsel), for appellee.

In this case plaintiff sues to recover damages sustained by him through a fall from a ladder leading up a chute to the top of a silo. The silo was 28 or 30 feet high and held together by iron hoops 30 inches apart. On one side of the silo an opening 28 inches wide was left from bottom to top. As the filling progresses this opening is closed by small doors 28 inches wide and 30 inches high, which fit into a frame-work prepared for them and are held in place by two short levers, one on either side, fixed by a bolt near the outer edge of the door. Upon the outer end of these levers is an eccentric flange so that when the lever handles are upright the flange does not engage with the frame work of the silo. When in proper position and pushed downward the eccentric flange presses firmly against the frame and the door is held in a fixed position. When so adjusted the ends of the levers or handles are in a horizontal position nearly touching each other in the center of the door, and they, together with the iron hoops, afford a safe and convenient sort of ladder upon which to mount the silo. If these doors be placed in position upside down the handles of the levers when not engaged would hang downward, and, in order to perform their service, would have to be raised upward to a horizontal position and when in that position the door would be held in place but the handles when subjected to any considerable weight would be liable to drop from a horizontal to a perpendicular position. The whole opening was protected by a chute which extended below the surface of the ground to the basement of the barn near which the silo was erected.

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Plaintiff was hired by defendant on October 4, 1915, to assist in cutting and hauling corn and to help fill two silos. He continued to work with the exception of a day or two until October 16th, when he was injured. During these 10 or 12 days plaintiff cut corn, hauled corn, dug potatoes one day, and helped tramp down the ensilage in the larger silo which was filled first. During the operation of the filling of the larger silo plaintiff's son for a time tramped the ensilage but made complaint to his father who thereupon changed work with him. This silo was filled without incident. The smaller silo which was only 10 feet in diameter was then filled and the tramping was done therein by plaintiff's son. On the day of the accident, plaintiff had been hauling corn from the field to the machine and between 2 and 3 o'clock had delivered his last load; 1 or 2 other loads remaining in the field were being drawn by other teams. A conversation ensued between plaintiff and defendant with reference to the sharpening of a set of knives to be used in the machine, and plaintiff was either directed or permitted to do said sharpening. He took the knives inside the barn, where, with the assistance of a younger son, he sharpened them. While engaged in this labor he was not in view of the defendant. Having completed the job, without reporting to defendant, his employer, he proceeded to the basement of the barn and there entered the chute and climbed to the top of the ladder above described. It was quite dark within the chute. All the doors of the opening, with the exception of the lowest one, had been placed upside down. The last door when placed left an opening only about eight inches high. Learning that the job within the silo was nearly complete, plaintiff attempted to descend, when the handles on the 3rd door from the top, upon which he was standing, dropped down, throwing his weight upon the handles of the top door which he held

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in his hands. These likewise dropped downward. He lost his hold and was precipitated to the bottom of the chute, somewhat seriously injuring both ankles. Asked to describe the accident, plaintiff said:

"I go in there and go up to ask my boy if I can do anything for him up there, and I go up there and talk with him, and he says: 'Well, up here we got it finished here pretty near; better go down and pick up the tools, that we don't have to go home so late at night; we have to move yet.' * * *

"*Q.* What were you going up there in that silo to do?

"*A.* To help him, if he needed any help, to help him; otherwise to see how far it was before we get done."

At the time of the accident there remained only 15 or 20 minutes' work before the filling of the small silo was completed. Upon completion of this job it was the purpose of the defendant to move his machine to the premises of a neighbor where the work of filling the neighbor's silo was to commence the next morning. Plaintiff was to participate in that labor but it is disputed whether in so doing he should become the employee of the neighbor or remain the employee of the defendant.

At the close of the plaintiff's testimony, and at the conclusion of defendant's case, a motion for a directed verdict was made upon the grounds:

"1. That at the time of the accident the plaintiff was not acting within the scope of his employment or in the line of his duty.

"2. Because at the time of the accident, the plaintiff was going about the premises for his own pleasure or convenience or curiosity.

"3. Because the plaintiff at the time of the accident was not going to any place where his duty called, nor for the performance of any of his duties, but that he had left his work and place, and gone to another part of the premises for his own purposes and was injured at a place, and at a time when he was not acting for or on behalf of the defendant, nor in pursuance of any order or direction given him by the defendant, and was

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not upon a place of said premises fitted up or intended for his amusement, pleasure, or recreation, or for that of any other person.

"4. Because at the time of the accident the doors were all in, and that there was no opportunity for any further work to be done. The obligation of master and servant had, so far as this particular work at that time was concerned, ceased, and the obligation of the master to maintain a safe place to work at that time had been ended."

This motion was denied and the case was submitted to a jury who found for the plaintiff in the sum of $1,926.40. Upon a former trial, plaintiff had recovered a verdict of $4,341. Upon motion for a new trial the motion was granted unless plaintiff should remit all of said judgment except $841, which he declined to do. Following the second verdict a motion for a new trial was made which was denied.

BROOKE, J. (*after stating the facts*). In this court, in addition to the four reasons for a directed verdict which may be considered together, defendant urges as ground for reversal alleged errors in the admission and exclusion of testimony; alleged errors based upon the conduct and language of the court in the progress of the trial; and alleged errors in the charge of the court.

We will first examine the assignment of error based upon the refusal of the court to direct a verdict in favor of the defendant upon the ground that at the time of the accident, plaintiff was acting without the scope of his employment and for his own pleasure and convenience. It is strenuously urged on behalf of the defendant that plaintiff's own testimony as to his reasons for mounting the ladder, "to help him, if he needed any help, to help him; otherwise to see how far it was before we get done," is a plain admission that his purpose was one of curiosity merely and was not inspired in a natural way by a desire to serve

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his master. In connection with this claim counsel notice that the work of filling the small silo was nearly completed; that it could have been completed no faster if the plaintiff had been able to assist his son as only such ensilage could reach the silo as was put through the machine, and also that plaintiff mounted the ladder without any fork, which, it is claimed, would have been necessary to enable him to perform any service of value within the silo. Many cases are cited by counsel for defendant which it is claimed support the position taken. Among them the following: *Spooner* v. *Detroit Saturday Night Co.*, 187 Mich. 125; *Lindstrand* v. *Delta Lumber Co.*, 65 Mich. 261; *Kinney* v. *Onsted*, 113 Mich. 98; *Hutchinson* v. *Cleveland-Cliffs Iron Co.*, 141 Mich. 346; *Bedell* v. *Berkey*, 76 Mich. 435; *Brinkman* v. *Zuckerman*, 192 Mich. 624; *Rayner* v. *Furniture Co.*, 180 Mich. 168; *Stetson* v. *Transportation Co.*, 182 Mich. 355; *Clem* v. *Chalmers Motor Co.*, 178 Mich. 340; *Gavigan* v. *Railway Co.*, 110 Mich. 71. Upon this point the court declined to hold, as a matter of law, that plaintiff in mounting the ladder was acting without the scope of his employment, but instructed the jury that whether or not such act was within the scope of his employment was a question of fact for their determination, saying:

"He must prove that at the time he went up that ladder he was still a servant of the defendant, and that in going up there he was about the defendant's work, and that he was authorized by the terms of his employment to so go up that ladder and for the purpose that he did ascend it. * * *

"If the plaintiff of his own volition was occupying the position that he did occupy upon this ladder merely for his own convenience and accommodation, or out of mere curiosity on his part, then he would not be entitled to recover. * * *

"And again, if you should find that the plaintiff at the time he was injured had quit the work assigned to him by the defendant, and voluntarily undertook to do

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work about which he had no duties to perform, by virtue of the contractual relations existing between him and the defendant, then while such condition exists the duty growing out of that relation, of using care by the defendant for plaintiff's safety, does not rest upon the defendant. * * *

"If you find that the plaintiff was not authorized, either expressly or impliedly, to go up that ladder as he did go; that if in going up there he was not in the performance of his duty toward the defendant and in the service of the defendant, then he would not be entitled to recover."

The rule, as stated in 4 Labatt's Master and Servant (2d Ed.), § 1566, is as follows:

"The question whether the injured person was acting in the course of his employment is for the jury, where the evidence is conflicting, or where a difference of opinion may reasonably be entertained with regard to the proper inference to be drawn from the testimony."

See, also, 26 Cyc. pp. 1461, 1462, and cases cited in note 36, and see 4 Thompson on Negligence, § 3753, and cases cited.

After a careful consideration of all the authorities cited we have reached the conclusion that the question whether or not at the moment of injury the plaintiff was acting within the scope of his employment was one for the jury and that it was properly submitted.

Error is assigned upon the action of the court in permitting the plaintiff to give his reasons for climbing the ladder on the ground that such testimony was self-serving. We think the evidence competent and its weight for the jury.

Other assignments relate to the admission or exclusion of testimony, but we find no reversible error therein.

In discussing the measure of damages, the court permitted the jury to consider the question of the de-

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creased earning power of the plaintiff. This is urged as reversible error upon the ground that:

"Plaintiff's own testimony established the fact that since the accident and at the time of the trial he was earning as much as before the injury and also that he had returned to an identical job at the same wages as he had worked at before the injury."

On behalf of the plaintiff it is pointed out that wages had gone up between the time of the accident and the time of the subsequent employment; that his injury made it necessary for him to do lighter work and that the undisputed testimony of Dr. Webb shows that the injury was of a permanent character and impaired plaintiff permanently. We think this element of damage was properly submitted to the jury.

Finally a reversal of the case is sought upon the ground that the trial judge indulged in improper conduct and language in the course of the trial. In denying a motion for a directed verdict the court said:

"He could not delegate the putting in of these to some of his employees and escape the liability for that neglect, to have that ladder properly built. The only wonder is others were not injured before the plaintiff here was injured."

This language, if used in the presence of the jury, would doubtless be open to serious objection, but it was not so delivered and therefore must have been without prejudice to the defendant. Two or three other episodes occurring in the examination of witnesses are cited to show that the court was prejudiced, and that such prejudice worked to the detriment of the defendant. While we have frequently held that conduct or language on the part of the trial judge indicating the bent of his mind constitutes reversible error, *Schwanz* v. *Wujek*, 163 Mich. 492, and *Jageriskey* v. *Railway*, 163 Mich. 631, we are yet of opinion after a careful perusal of this record that the rights of the

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defendant were not prejudiced by the conduct or language of the court.

The judgment is affirmed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, FELLOWS, and STONE, JJ., concurred. KUHN, J., did not sit.

ROACH v. KELSEY WHEEL CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DEFENSES—REVIEW—RULE OF INDUSTRIAL ACCIDENT BOARD.

On certiorari to review an award of compensation by the industrial accident board, under the workmen's compensation act, defenses not relied upon in defendant's statement denying liability, filed in conformity with a rule of the board, and not relied upon on the hearing before the arbitration committee and on review before the full board, are not available in the appellate court.

2. SAME—"ACCIDENT"—DEATH—LIABILITY OF EMPLOYER.

Where claimant's decedent was employed to help tear down some brick work in the superheated boiler room of defendant's plant, during very hot weather in July, and was overcome by the heat on July 24th, remaining away from work on the 25th, but returning to work on the 26th and continuing to work until the afternoon of the 27th, when he was again overcome by the heat and died the same evening, his death was not the result of an accident rendering the employer liable under the provisions of the workmen's compensation act. MOORE and FELLOWS, JJ., dissenting.

Certiorari to Industrial Accident Board. Submitted October 16, 1917. (Docket No. 152.) Decided March 27, 1918.

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Phoebe Roach presented her claim for compensation against the Kelsey Wheel Company for the accidental death of her husband in defendant's employ. From an order awarding compensation, defendant and the Ætna Life Insurance Company, insurer, bring certiorari. Reversed.

Douglas, Eaman & Barbour, for appellants.

Howard H. Campbell (*Albert E. Meder*, of counsel), for appellee.

FELLOWS, J. (*dissenting*). Plaintiff is the widow of George Roach, a workman; defendant Kelsey Wheel Company an employer of labor operating under the workmen's compensation law at the time of the transaction; the Aetna Life Insurance Company its insurer. In the conduct of its business the Kelsey Wheel Company, hereafter called the defendant, deemed it necessary to tear out and rebuild the brick work around one of the boilers in its plant. Whenever it was necessary to do such work it was its custom to employ one Nicholas Jackman, a mason by trade, who would procure such additional help for it as might be desired. Jackman and the helpers were each paid the union wage by defendant, punched the clock as other employees did, and continued in the employ of defendant until the work in hand was completed. Jackman, Roach and others commenced this work July 24, 1916. The weather was extremely warm. The first thing done was to tear out the old brickwork, and carry away and dump the old brick and mortar outside. The wreckage was piled on trucks which were quite heavy, and these trucks when loaded were pushed outside the building by the workmen and unloaded. The brick work around the boiler was still warm when the work was undertaken and the adjoining boiler was in operation under a head of steam stated to be 125 pounds. The partition walls were heated and it is said

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that the place where the wrecking was being done had a temperature of around 136 degrees. The laborers could not remain under such heat for any considerable time. On the first day of the employment decedent was prostrated by the heat and went home. He did not work the next day, but did the following day until shortly before quitting time, when we infer, although the record is not clear, he had another attack which was slight. The following afternoon he again collapsed, was taken to his home and died that evening. A fellow employee who was with him when he fell testified:

"I was with him on the last day that he worked there, when he fell. He was standing up and we were just going to give the thing another shove, this truck, and he fell over on the side of his face. We picked him up and he was bleeding. He fell against the only thing there, concrete. The fall made his face bleed. He fell right up against the concrete. It is all concrete there where we were working at the time. Hit his head against the concrete. He became unconscious right then. After he fell over he never said anything more. We were inside of Kelsey's yet. We were taking a rest. It was pretty heavy. We were inside of the building. We would shove it out a little, then take another rest. Then we gave another push and he fell. He had been working under the boilers there."

On October 16, 1916, plaintiff having filed a claim for compensation, defendant denied liability in the following language:

"As it appeared from our investigation that Mr. Roach's death was due to being overcome by the excessive heat of the season we did not regard same as arising out of the employment and therefore no report was made for your office and for the same reason we will have to decline entering into an agreement to pay compensation under the Michigan workmen's compensation act."

Arbitrators were appointed and at the opening of

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the hearing by the board of arbitration the following occurred:

"*Chairman Reaves:* I will ask you to stipulate, Mr. Kennedy, what you can in this case.
"*Mr. Kennedy:* (defendant's attorney) As far as we are concerned we can admit that his wages were forty cents an hour, working eight hours a day.
"*Mr. Reaves:* You admit he was employed by the Kelsey Wheel Company?
"*Mr. Kennedy:* Yes.
"*Chairman Reaves:* As a laborer?
"*Mr. Kennedy:* Yes.
"*Chairman Reaves:* Repairing boilers?
"*Mr. Kennedy:* Yes.
"*Chairman Reaves:* For the Kelsey Wheel Company. He was employed there on July 27th?
"*Mr. Kennedy:* That is correct."

The board of arbitration awarded plaintiff $9.80 per week for 300 weeks, which award was affirmed by the industrial accident board. The accident board filed a full and complete finding which it will not be necessary for us to here detail. From this finding we gather that the board concluded that the deceased met his death as the result of a heat stroke induced by the superheated condition of the place of employment, coupled with the strain incident to moving the loaded truck. To review this proceeding we allowed this writ of certiorari. Defendant here insists that the award should be reversed:

"* * * Because the board erred in finding:
"1. That George Roach was an employee of the Kelsey Wheel Company within the scope of the compensation act; because
"(*a*) His employment was casual only.
"(*b*) His employment was not in the usual course of the trade, business, profession or occupation of his employer.
"(*c*) He was an employee of an independent contractor.
"2. That death resulted from an accidental injury

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sustained by Roach, arising out of and in the course of his employment."

We are met at the threshold of this case with a question of procedure which must be first considered, as it determines the scope of our inquiry. The plaintiff insists that the questions presented under the first head are not here available; that defendant in its statement denying liability relied solely upon the defense that deceased met his death by reason of excessive heat, which defendant then claimed, and now claims, was not an accident arising out of his employment; that the case was submitted to the board of arbitration upon that theory, and that by reason of this fact, and the admissions of the defendant, the defenses here sought to be interposed under the first head are not open, leaving the sole question for our consideration whether the death of deceased was, within the meaning of the act, due to an accident arising out of his employment.

By section 3, part 3, Act No. 10, Extra Session 1912 (2 Comp. Laws 1915, § 5456), the act creating the industrial accident board and prescribing its powers and duties, it is provided:

"The board may make rules not inconsistent with this act for carrying out the provisions of the act."

Pursuant to this provision the board has adopted a set of rules of procedure governing proceedings before the board, Rule V of which reads as follows:

"If the employer denies liability in case where a claim for compensation is filed by an injured employee or his dependents, such denial shall be filed with the board in writing by such employer and shall set forth with reasonable detail and certainty the facts and circumstances upon which he relies as a defense to such claim. Upon the filing of such denial in the office of the board, a copy of same shall be furnished to the claimant, so that he will have such seasonable information as to the nature and particulars of the employer's

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defense as may be reasonably necessary to enable him to procure witnesses and prepare for the hearing. Respondents will be limited to the grounds of defense so stated on the arbitration hearing and also on review before the full board."

That power to make rules is lodged in the board, the section above quoted demonstrates; that the rule above quoted is a reasonable exercise of such power, seems to us beyond cavil. It bespeaks an orderly procedure, gives notice to parties interested of the issue raised, and an opportunity to procure witnesses and prepare for a hearing upon such issues. It aids the due administration of justice which is as much the duty of administrative boards as of the courts. We do not undertake to say and do not say that technical niceties, or strict rules of common law pleadings should be indulged in or favored. On the contrary, substance, rather than form, should be the object of attainment. That the board in its discretion, in the interest of justice, may allow amendments to such notice, we have no doubt. The question of abuse of discretion by the board being one for review in this court. *Brunette* v. *Mining Co.*, 197 Mich. 301.

In the case of *Lobuzek* v. *Foundry Co.*, 194 Mich. 533, this court had occasion to consider the rules of this board with reference to the taking of depositions in a foreign country, and reversed the case because the board based its finding upon a so-called "protocol" taken without notice and not in accordance with the rules. In *Brown* v. *George A. Fuller Co.*, 197 Mich. 1, we said:

"Had defendant intended to raise these questions it should have done so before the arbitration committee."

And in *Hamilton* v. *Macey Co.*, 195 Mich. 747, we said:

"While in proceedings of this nature we recognize

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the propriety of ignoring so far as is reasonably possible technicalities, to the end that early adjudication may be had, we are still of opinion that the board in its consideration of evidence should be bound by rules promulgated under its own authority."

The rule in question was within the power of the board to adopt. It is reasonable and valid; it not only binds the board, and litigants before it, but it binds this court. Being reasonable and within the power of the board, this court must follow it and recognize it in cases coming here for review.

In the instant case only one defense was set up in the notice, and this appears to have been set up after "investigation." At the hearing before the board of arbitration certain facts were admitted without claim of any qualifying circumstances or facts surrounding them. The case was disposed of on the record as made. We must here dispose of it on the same record. The plaintiff is correct in the contention that the rule under consideration should be given force by this court, and that, giving force to it, defendants "will be limited to the grounds of defense so stated" in its denial of liability.

We therefore come directly to the meritorious question in the case, whether, within the meaning of the act, decedent's death resulted from a personal injury arising out of and in the course of his employment. That he collapsed on the premises of the defendant, while in its employ, is admitted; that he was within the ambit of his employment is not questioned; he was in the course of his employment beyond doubt. That he was a man in robust health with no predisposition to disease, and temperate in his habits, the record discloses. The board found that he suffered a heat stroke which was brought upon him by the superheated condition of his place of employment, and the testimony abundantly supports such conclusion; that he fell in-

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stantly upon an excessive exertion in shoving the heavy truck loaded with brick and mortar after working in the heat under the boiler, appears from the testimony of his fellow employee who was by his side when he fell. This is not a case of a workman being subjected to the ordinary heat of a summer day and which is an incident in the life of all, but is a case where to the natural heat of a hot summer day was added in the particular place of his employment so many degrees of artificial heat as to make it well nigh intolerable, and the men could stand it but a short time and changed frequently. The case is very much like that of *LaVeck* v. *Parke, Davis & Co.*, 190 Mich. 604, and is controlled by it. If anything, it is stronger for the plaintiff than was that case. As that case is so recent and the authorities are there considered, we content ourselves with citing that case, and challenging attention to the following cases there cited which are particularly in point: *Ismay, Imrie & Co.*, v. *Williamson*, 1 B. W. C. C. 232; *Johnson v. SS. Torrington*, 3 B. W. C. C. 68. See, also, *Davies* v. *Gillespie*, 5 B. W. C. C. 64; *Maskery* v. *Shipping Co.*, 7 B. W. C. C. 428, and the late case of *Kanscheit* v. *Laundry Co.*, 101 Neb. 702 (164 N. W. 708).

The award of the industrial accident board should be affirmed.

MOORE, J., concurred with FELLOWS, J.

BROOKE, J. I concur with Justice FELLOWS in holding that the defenses relied upon by appellant under its first claim are not available to it because of the rule of the board limiting the grounds of defenses to those stated "on the arbitration hearing and also on review before the full board."

Upon the second question involved, however, I am unable to agree with the conclusion stated by my Brother FELLOWS. I have examined this record with

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care and cannot find therein any evidence of an accident. The work in which claimant's decedent was engaged at the time he was prostrated was being carried on on July 24th, 25th, 26th, and 27th at a time when the temperature outside the building was extremely high. He was overcome and fell unconscious on the 24th and did not report for duty on the 25th. On the 26th he continued to work practically during the entire day, but complained of a headache and stopped working shortly before quitting time. On the 27th he again worked practically the whole day, being again overcome by the heat at about 4 o'clock in the afternoon and he died at 6 or 7 o'clock upon that day. The record is absolutely barren of any evidence that anything untoward or unusual happened in the course of his employment during any of the three days or that he exerted himself in any unusual manner or to an unusual degree. He was doing the work which he and his associates were employed to do exactly in the manner they expected to do it. To permit recovery in this case would make it impossible to deny recovery in any case where a fireman of a stationary or marine boiler, in the performance of his ordinary and accustomed labor, succumbs to heat prostration.

The Michigan compensation act provides compensation for accidental injuries only, *Adams* v. *Color Works*, 182 Mich. 157. Recovery here is predicated upon the cases of *Schroetke* v. *Jackson-Church Co.*, 193 Mich. 616, and *LaVeck* v. *Parke, Davis & Co.*, 190 Mich. 604. I am of opinion that neither case is authority for the determination of the board, but that compensation should have been denied under our holdings in *Kutschmar* v. *Briggs Manfg. Co.*, 197 Mich. 146, and *Johnson* v. *Mining Co.*, 199 Mich. 218.

The award of the board should be reversed.

OSTRANDER, C. J., and BIRD, STEERE, STONE, and KUHN, JJ., concurred with BROOKE, J.

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LINK *v.* FAHEY.

1. TRIAL—JURY—VOIR DIRE EXAMINATION—CHALLENGES—APPEAL AND ERROR—WAIVER.

In an action for damages against the owner of an automobile, where plaintiff's counsel in the *voir dire* examination inquired of each juror if he owned an automobile, if it was insured, and if he was a member of the Citizens' Mutual Automobile Insurance Co., said examination apparently being in good faith, and counsel for defendant, after examining the jury, passed them for cause, and both sides announced themselves satisfied with the jury, and the record does not disclose that counsel for defendant exercised any of his peremptory challenges or preferred any request to charge upon the subject, any error in the examination is *held*, to have been waived.

2. EVIDENCE—HEARSAY—RES GESTÆ — ADMISSIONS — APPEAL AND ERROR—AUTOMOBILES.

In an action against the owner of an automobile for damages caused by a collision with a motorcycle on a public highway, where witnesses were permitted to testify as to what was said by the driver and the occupants of the automobile, a few minutes after the accident occurred, in the nature of admission of responsibility for the accident, where, independent of said testimony, plaintiff had sustained his theory of the case by a clear preponderance of the evidence, its admission, even if erroneous, *held*, not prejudicial. OSTRANDER, C. J., dissenting.

Error to Livingston; Hart, J., presiding. Submitted October 15, 1917. (Docket No. 120.) Decided March 27, 1918.

Case by Henry L. Link against Jeremiah J. Fahey for damages to plaintiff's motorcycle. Judgment for plaintiff. Defendant brings error. Affirmed.

W. P. Van Winkle & Son and *L. E. Howlett*, for appellant.

Francis J. Shields, for appellee.

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Plaintiff brought suit to recover damages growing out of a collision between his motorcycle with sidecar attachment and an automobile belonging to the defendant, driven by his daughter, Kathleen Fahey, and in which at the time of the accident were defendant's wife, another daughter, and a friend. The collision occurred at a point in the highway where a road running in a northeasterly direction intersected a road running east and west. Plaintiff was driving his machine in a northerly or northeasterly direction as he approached the corner and defendant's machine was being operated in a westerly direction. In attempting to turn south the automobile came into collision with plaintiff's motorcycle, on the right-hand or easterly side of the north and south road, at a point very close to the corner.

It was the claim of plaintiff that upon the day in question he was operating his motorcycle in a careful and prudent manner, having it fully under control as he approached the intersection; that he saw the automobile approaching; turned to his right, and finally came to a full stop and that the automobile struck him when his machine was within two feet of the fence along the easterly side of the highway. His testimony as to the manner in which the accident occurred was supported by that of four eyewitnesses who were seated in a dooryard about 13 or 14 rods distant from the point of collision. One other witness who arrived very shortly after the accident and examined the wheel marks left by the motorcycle, testified that at all times said machine was operated to the right of the center of the road going north.

The driver of the automobile gave testimony tending to show that her view of the north and south road was obscured by a field of growing corn and that when she turned to the south she saw plaintiff approaching her at a very rapid rate of speed in the center of the road

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and that he swerved to the left. Believing that he intended to pass her on the wrong side, she turned to the left to give him the road, when he swung deliberately in front of her. She further testified that at the time of the collision, the automobile she was driving had come to a full stop. Defendant's story received more or less support from the testimony of the other occupants of the car.

The jury returned a verdict in favor of the plaintiff in the sum of $175.

BROOKE, J. (*after stating the facts*). But two errors are relied upon by defendant:

1st. That there was reversible error committed in the examination of the jurors upon *voir dire*, in that counsel for plaintiff inquired of each juror if he owned an automobile, if it was insured, and if he was a member of the Citizens' Mutual Automobile Insurance Company. Some of the jurors answered one or more of these questions in the affirmative, and one juror was peremptorily challenged by counsel for plaintiff. Counsel for defendant examined the jury and passed them for cause and thereafter counsel for both sides announced themselves satisfied with the jury. The record does not disclose that counsel for defendant exercised any of his peremptory challenges. Upon this point counsel for defendant cites us to the case note from page 153, L. R. A. 1915A (*Egner* v. *Curtis, Towle & Paine Co.*, 96 Neb. 18), touching the question, and rely upon the case of *Swift* v. *Platt*, 68 Kan. 10, where it is said:

"The inquiry should be conducted by pertinent questions asked in good faith and be confined within reasonable limits."

The record is barren of anything tending to show that the inquiry was prosecuted in bad faith; indeed, the circuit judge, in his denial of a motion for new

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trial based upon this alleged error, among others, certifies to the contrary. No request to charge upon the subject was preferred and the jury was passed for cause, after the alleged erroneous inquiry had been made. Under those circumstances we must hold that the matter was, in any event, waived within *Roach & Co.* v. *Blair*, 190 Mich. 11, and *Snyder* v. *Mathison*, 196 Mich. 378.

2d. Error is assigned upon the admission of the testimony of several witnesses to the effect that very shortly after the accident, Kathleen Fahey, the driver of the automobile, admitted that she was at fault. Particular objection is urged against the testimony of one Mr. Phylo who did not arrive at the scene of the accident until some 15 or 20 minutes after it had occurred. The court excluded his testimony as to what was said by the passengers in the automobile, but permitted him to testify as to what he heard the driver of the car say. This witness testified:

"The lady that claimed to be driving the car told her mother that there was no use of talking about it because she was to blame, she had no business on that side of the road."

Other witnesses were permitted to testify to what was said by the other occupants of the automobile within five minutes after the accident occurred. In denying a motion for new trial, based upon this, among other grounds, the court said:

"In the above cause the court does not feel that the admitting the testimony of the witness Phylo and the witness Smith as to the statements made by Kathleen Fahey, driver of the automobile, was error. These statements were made by the driver at the time of the occurrence of the collision and before they could be manufactured, and to me were within the rule of *res gestæ* statements. For this reason I do not think the motion for a new trial on this ground is well founded."

Defendant strenuously contends that this evidence

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was inadmissible, and its admission reversible error, under the recent cases of *Rogers* v. *Railway Co.*, 187 Mich. 490, *Hyatt* v. *Storage Co.*, 196 Mich. 337, and the cases therein digested. As bearing upon the character of the error in admitting the testimony objected to in the case last above mentioned, this court said:

"One cannot read this record without being impressed with the fact that the testimony here complained of was probably controlling of the verdict in the case, and we think, therefore, that its reception was prejudicial error."

In the case at bar a careful reading of the record impresses us with the belief that no different result would have been reached by the jury if the alleged objectionable testimony had been rejected. Independent of such testimony, plaintiff had sustained his theory of the case, by what appears to us to be a clear preponderance of the evidence. Assuming, then, that the declarations of the driver of the automobile, made soon after the collision, should have been excluded as hearsay or mere narrative of a past event, we are still of the opinion that its admission, even if erroneous, was not prejudicial.

The judgment is affirmed.

BIRD, MOORE, STEERE, FELLOWS, STONE, and KUHN, JJ., concurred with BROOKE, J.

OSTRANDER, C. J. (*dissenting*). There was a collision of vehicles, resulting in some damage, which collision was either a pure accident or was the fault of one or other or both of the drivers. To determine just what took place, those who occupied the vehicles were competent witnesses, and no reason appears for not having called them as witnesses. Instead of this, witnesses were permitted to testify what the occupants of the vehicles, or one of them, including the driver of one of them, said with respect to the matter.

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It is elementary that this was hearsay testimony, and not admissible. It goes without saying that it was prejudicial to one of the parties.

Assuming, as I do, that it is the province of a jury called to determine an issue of fact to weigh the testimony, determine the credibility of witnesses, and in other respects to apply to the testimony tests to determine where the truth lies, I think it is not the province of this court, in a case where prejudicial, inadmissible testimony has been admitted, to determine that, independent of that testimony, "plaintiff had maintained his theory of the case by what appears to us to be a clear preponderance of the evidence."

Whether evidence preponderates must, in my opinion, always be a question for the jury.

The judgment should be reversed and a new trial ordered.

DULUTH, SOUTH SHORE & ATLANTIC RAILWAY CO. *v.* WILSON.

1. CONTRACTS—ASSIGNMENTS—PUBLIC POLICY—CUSTOMS BROKER—ASSIGNMENT OF FEES.

   There are no questions of public policy involved which would affect the right of a customs broker to make an assignment of the fees to be received therefor; the duties being of a private nature.

2. SAME—MASTER AND SERVANT—RIGHT OF MASTER TO EARNINGS OF SERVANT.

   In view of the general rule that all the time and labor of an employee belongs to his employer during the hours of

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service, and that the master is entitled to the earnings of the servant earned outside his employment during such hours, an express contract to that effect is valid and enforceable.

3. SAME—MASTER AND SERVANT—RAILROADS—ASSIGNMENTS—PUBLIC POLICY.

A contract between a railroad company and a clerk employed in its freight office, by which said clerk agreed to remit to the company all fees received by him as a customs broker, in consideration of his receiving a fixed salary, he acting in such capacity for the purpose of facilitating the company's freight service, *held*, not void as against public policy.

4. SAME—PUBLIC OFFICERS—ASSIGNMENT OF SALARY.

If said contract be considered an assignment, *held*, not within the exception made in the salaries of public officers and certain fiduciary officers, and therefore valid.

5. SAME—CORPORATIONS—ULTRA VIRES.

The doctrine of *ultra vires* cannot be applied to contracts not prohibited, either expressly or by necessary implication, in the statute.

6. SAME—PLEADING—APPEAL AND ERROR.

The defense of *ultra vires* is not available unless specially pleaded.

7. SAME—ESTOPPEL—PERFORMANCE—ULTRA VIRES—PUBLIC POLICY.

Where a contract has been fully performed on the one side, and no question of public policy is involved, the other party is estopped from setting up the defense of *ultra vires*.

8. SAME—RAILROADS—CUSTOMS BROKERS—ASSIGNMENT OF FEES—PERFORMANCE—ESTOPPEL—ULTRA VIRES.

Where a railroad company entered into a contract with a clerk employed in its freight office whereby said clerk was to act as a customs broker for the purpose of facilitating its freight service, and he in return for a fixed salary, which was increased from time to time, agreed to remit the fees received by him as such broker to the railroad company, and the company performed its part of the contract for six years, and until the termination of the employment, defendant is estopped from claiming that the contract was *ultra vires*, in an action to recover part of the fees not remitted in accordance with said contract.

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Error to Chippewa; Fead, J. Submitted January 24, 1918. (Docket No. 171.) Decided March 21, 1918.

Assumpsit by the Duluth, South Shore & Atlantic Railway Company against Edmund Wilson for brokerage fees received while in plaintiff's employ. Judgment for plaintiff. Defendant brings error. Affirmed.

M. M. Larmonth, for appellant.

Warner & Sullivan (*Ralph R. Eldredge*, of counsel), for appellee.

STONE, J. Action to recover the amount which defendant had retained of fees as customs broker, while in plaintiff's employment as chief clerk at Sault Ste. Marie.

The declaration consisted of the common counts in assumpsit, and the plea was the general issue with a notice of set-off. The facts were stipulated, and counsel for the respective parties agreed, in open court, that there being no question of fact to submit to the jury, the trial court should direct a verdict and judgment to be entered, as might be determined. Briefly stated, the facts as stipulated were as follows:

The plaintiff maintains a local freight agent at Sault Ste. Marie, Michigan, and a freight office jointly with the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, in which defendant was employed as chief clerk for many years prior to January 15, 1915. On February 21, 1907, plaintiff's local freight and passenger agent at Sault Ste. Marie, Michigan, (Col. Frank E. Ketchum) died, and thereafter the positions of local freight and passenger agents were separated, and Garret Gilbert was appointed the freight agent and yardmaster in charge of the plaintiff's freight business at this point. Large quantities of freight are daily received by the plaintiff over the

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Canadian Pacific lines and across the International bridge from Canada for transportation to various points in the United States over the lines of said two railway companies; and it has been the custom of plaintiff, to a very large extent, to facilitate such shipments, to have its local freight agent or chief clerk act as customs broker.

Up to the time of the death of Col. Ketchum he performed this service, and as part of the compensation paid him he was to, and did retain the fees therefor. The defendant was at this time clerk in the plaintiff's freight office at Sault Ste. Marie, Michigan, and was paid a fixed and certain salary for his services. He was also recognized as the customs broker from and after February 12, 1907, turning over the fees collected for this service to Col. Ketchum from time to time. On the appointment of Mr. Gilbert as local freight agent of the plaintiff, on March 1, 1907, following the death of Col. Ketchum, the defendant continued to act as customs broker, and the fees for such services were collected and remitted from time to time, with a record of the entries made, to the treasurer of the plaintiff at Marquette, Michigan, and report of the same was sent by defendant to plaintiff's auditor.

Gilbert chose to accept a fixed and certain salary of $175 per month for his services, and thereafter all fees collected were to be remitted to the plaintiff's treasurer, these remittances to be made, from time to time, in the name of Garret Gilbert, per Edmund Wilson, to which the defendant agreed under the circumstances hereinafter set forth.

Up to and including November, 1914, monthly statements purporting to show all entries made and fees collected therefor were sent to the plaintiff's auditor at Marquette, Michigan, and remittances for each of such monthly statements were sent to the plaintiff's treasurer at Marquette.

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The necessary blanks for the conduct of such business were purchased by the defendant from the collector of customs of the district and the cost deducted from remittances to plaintiff's treasurer, and the reports to plaintiff's auditor show the number of blanks and the cost of each, excepting in two instances where there was a shortage of blanks in the collector's office and the defendant procured two orders for blanks, amounting to $18, from a local printing company, no charge being made to the plaintiff and no deduction being made from the fees collected. Later, and during the year 1914, blanks were furnished on requisitions from the defendant.

At the time the local freight agent, Mr. Gilbert, was appointed, Mr. Fitch, who was then president of the plaintiff company, and Mr. Gilbert went to the freight office where defendant was employed, and defendant was advised by Mr. Fitch that all the customs brokerage work formerly done by Frank E. Ketchum would, in the future, be the work of the defendant; and, because Garret Gilbert was getting a fixed salary for his work, the fees for such customs brokerage work would be remitted to the railway company. These remittances were to be made by the defendant in the name of Garret Gilbert, the local freight agent, and were to be remitted as received, and defendant promised to remit such fees as were earned by him as customs broker, and this agreement has never been changed.

The defendant Wilson was appointed chief clerk and cashier of the plaintiff company on January 6, 1907, at a salary of $90 per month. In February, 1907, he was relieved of the position of cashier, C. E. Barney being appointed to that position, and the defendant continued to act as chief clerk at $90 per month.

A short time later the defendant applied to Mr. Gilbert for an increase in salary, because the duties of Mr. Gilbert as yardmaster took so much of his time

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away from the office that it necessitated much additional work for the defendant, and Mr. Gilbert, the local freight agent, recommended to Mr. Fitch, who was then president of the plaintiff, that defendant's salary be increased to $100 per month, owing to the fact that, together with his ordinary and usual duties, he was required to work longer hours than if he were not compelled to do this work and defendant's salary was raised to $100 per month, and continued at this figure for some years, being subsequently raised so that at the time he ceased to be an employee of the plaintiff his salary was $105 per month.

The government did not exact a fee for licensing brokers, and there was no fee or other charge under the act of congress of 1894, and defendant was first appointed customs broker on February 12, 1907, because of the illness of the local freight agent, and defendant had been for some little time making entries and signing the name of Col. Ketchum to the same, and the customs officials at said port refused to longer accept entries of this character.

After the act of 1910 providing for licensing of customs brokers, defendant was, on August 10, 1910, licensed by the United States government as customs broker and continued said work. Under this act no fee was exacted by the government for customs brokers.

The act of October 22, 1914, provides that on and after November 1, 1914, customs brokers shall pay an annual tax of $10. This tax, amounting to $6.70 from November 1, 1914, to July 1, 1915, was paid by the defendant and charged to the plaintiff by deducting the amount from his statement of fees collected for November, 1914.

The total amount of the shortage up to the time the defendant ceased to be in the employ of plaintiff was $560.60, which sum is made up of the fees collected as

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customs broker by defendant from and after December 1, 1914, and the amount the defendant from time to time kept out of his remittances prior thereto, when he was reporting smaller amounts than actually collected. Up to and including June, 1913, defendant remitted the actual amounts received from such fees.

Defendant was in the employ of the plaintiff as clerk at the transfer station and freight office about 21 years, resigning his position about the middle of January, 1915. At the time he left the company's service it refused to pay him his last month's salary, amounting to $105.

There has been collected and paid over to the plaintiff in brokerage fees earned by the defendant, from March 1, 1907, to the time defendant resigned his position as chief clerk, the sum of $8,984.50.

This action was begun to recover the amount which defendant had retained, and the counter claim was for the amount of fees which had been remitted to the plaintiff.

It is the claim of the plaintiff that by reason of this arrangement it was entitled to retain and have the fees earned by the defendant. On the other hand, it is the claim of the defendant that as he was the customs broker, he was entitled to the fees which he had earned, and is entitled to recover from the plaintiff the sum of $8,984.50, together with his month's salary amounting to $105, and interest on the same.

The trial court directed a verdict in favor of the plaintiff for $457.92, which sum was determined by deducting from the fees retained by defendant ($560.60), his salary of $105 and blanks paid for by him of $18, amounting to $123, which sum being deducted left the amount of $437.60, to which was added interest, $20.32.

The trial court, in its charge directing a verdict among other things, used the following language:

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"From the statement of facts, it is evident that the plaintiff is entitled to a verdict unless the contract, by which the defendant agreed to pay the plaintiff the fees earned by him as a customs house broker, is invalid and unenforceable. Defendant's first contention is that a customs house broker is an officer of the United States, and the contract, being for the assignment of official fees, is void as against public policy. There is no merit in this contention. A customs house broker is not an officer of the United States. He is not appointed by the President, a court of law, nor the head of a department, *i. e.*, a member of the cabinet (citing the Constitution of the United States and authorities). He is neither elected nor appointed. He exercises his rights by virtue of a license, which is not an investiture of government functions, but the granting of a privilege.

"The act under which he is licensed, negatives any idea of official character:

"(*a*) By providing that any citizen of good moral character is entitled to a license. Officers are not so self-constituted.

"(*b*) By providing for the licensing of copartnerships and corporations as such. A corporate public officer would be an innovation.

"He is invested with no part of the sovereign functions of the government. He is the agent of the importer and deals with the government in that capacity. Moreover, his duties are not analogous to those of an executor or administrator. * * * He may act for whom and so far as he pleases. The license merely gives him the privilege of entering the goods for those who choose to employ him and for whom he chooses to perform such service."

"Defendant also contends that the contract was without consideration, there being no new consideration in the way of an increase of salary or position moving to defendant. It could hardly be contended that an increase of duties without a corresponding increase of salary would render the extra work imposed without consideration, and give a right of action for overtime. If so, employers would be unable to change work or add duties to employees without being liable for additional compensation. The continuation of the em-

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ployment is a sufficient consideration for all duties imposed upon an employee, in the absence of agreement or custom allowing overtime, and is certainly sufficient consideration when an express agreement is made to that effect. In any event the relief from the duties of cashier would be a valid and sufficient consideration for the contract at bar.

"Defendant also contends that the contract was *ultra vires* the plaintiff, (*a*) because the plaintiff would not be licensed as a customs broker, and (*b*) because the contract was not within the powers of a railroad corporation. * * * The contract at bar contains no engagements on the part of the plaintiff to do any act for the legal performance of which a license is required, nor does plaintiff assume any of the duties of a customs house broker. It is a personal contract between the plaintiff and defendant with reference only to the fees arising from such employment. * * *

"The character of the employment of a customs house broker is private, as distinguished from public. His intervention is not necessary in the importation of goods. The importer may make his own entry, or may employ any broker who has a license. The broker is paid by the importer, and is, as a matter of fact, his agent for the single transaction or entry. He performs no duties on behalf of the public, and the public is not concerned about his fees. There are no considerations of public policy intervening which would affect the disposition of his earnings. His services stand upon no other basis than any other private employment.

"While exception is made in the salaries of public officers and certain fiduciary officers, it is settled that an assignment of wages or earnings to be earned in the future, when coupled with an interest by virtue of a subsisting contract of employment, is valid. *Rodijkeit* v. *Andrews*, 5 L. R. A. (N. S.) 565 (74 Ohio St. 104).

"If the contract between the plaintiff and defendant be considered an assignment, it would appear to be valid under the above decision, as it does not come within the excepted class.

"But, in my judgment, the transaction more prop-

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erly falls within the general rule that, all the time and labor of the employee belongs to the employer during the hours of service and the master is entitled to the earnings of the servant earned outside his employment during such hours. While there are numerous exceptions to this rule, it is recognized that an express contract to that effect is valid and enforceable. 26 Cyc. p. 1020; *Barber* v. *National Carbon Co.*, 5 L. R. A. (N. S.) 1154 (129 Fed. 370).

"A corporation has within the express or implied powers of its charter the same authority to contract as has a natural person. It has the right to employ servants and to contract with them as to their duties and compensation. In the case at bar, then, under the authorities above stated, the contract at issue is valid, and the plaintiff is entitled to recover the withheld brokerage fees unless such a contract is *ultra vires*, express and implied, of a railroad corporation. * * *

"The rule as now stated, upon the doctrine of *ultra vires*, is as follows:

"'The implied powers of a corporation are not limited to such as are indispensably necessary to carry into effect those expressly granted, but comprise all that are necessary, in the sense of being appropriate, convenient and suitable, for such purposes, including the right of a reasonable choice of means to be employed.' 10 Cyc. p. 1097.

"'Whatever may fairly be regarded as incidental to, and consequential upon, the things which are authorized by the charter of a corporation, will not be held by judicial construction to be *ultra vires*, unless expressly prohibited.' 10 Cyc. p. 1098; *Jacksonville, etc., Navigation Co.* v. *Hooper*, 160 U. S. 514.

"Thus, while the railroad company would not be entitled to engage in the independent operation of a hotel or the maintenance of a warehouse for the storage of goods, it may provide hotels and eating houses and elevators when they are reasonably connected with the comfort of passengers and employees, or the convenience of shippers over the company's lines. *Western Maryland R. Co.* v. *Hotel Co.*, 2 L. R. A. (N. S.) 887, note (102 Md. 307); *Louisville Property Co.* v. *Commonwealth*, 38 L. R. A. (N. S.) 830 (146 Ky. 827).

"The rule prevailing in Michigan is stated in *Ely* v. *Oakland Circuit Judge*, 162 Mich. 466, 471:

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"'The doctrine of *ultra vires* cannot be applied to contracts not prohibited, either expressly or by necessary implication, in the statute.'

"In *Timm* v. *Brewing Co.*, 160 Mich. 371, it was held that a brewing company may further its business by giving a bond to secure sureties on a liquor dealer's bond of one of its customers, and the contract is not *ultra vires*, nor outside the scope of its business. The court there said:

"'Under the well settled rule, the defendant had implied power to do those things necessary and helpful to the conduct of its authorized business.'"

See *United States Brewing Co.* v. *Dolese & Shepard Co.*, 47 L. R. A. (N. S.) 898 (259 Ill. 274), note.

"There is nothing immoral, criminal nor *malum prohibitum* in the contract in question. The plaintiff abnegates none of its public duties, and as the contract affects only the parties to it, no considerations of public policy enter into the agreement. It is not expressly prohibited by plaintiff's charter, nor can there be said to be an implied prohibition unless the contract amounts to such a departure from the statutory business of the plaintiff as to be a perversion of its legal functions.

"It is undoubtedly the law that if the employment of a customs broker were so entirely unconnected with the business of the plaintiff as to amount to an entirely independent undertaking, apart from the purpose of a corporation, the plaintiff could not enter into such a contract.

"The agreed statement of facts recited:

(IV) "'It has been the custom of the company to a very large extent to facilitate such shipments (over its own line or over the Soo line, with which it maintains a joint freight office at Sault Ste. Marie), to have its local freight agent or chief clerk in the local freight office, act as customs broker.'

"The business of plaintiff under its charter is the carrying of passengers and the transportation of merchandise. In furtherance of such business it has the right to maintain with the Soo Line a joint freight office under such arrangements as may be agreed upon.

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The primary effect of defendant's employment was to continue his service as chief clerk. So much of the contract was entirely within the authority of the plaintiff. In addition to this, defendant's employment as a customs broker so far as it pertained to goods shipped over plaintiff's road, operated for the convenience of its shippers and the facilitation of its freight service, was thus directly connected with the express business of the plaintiff to transport goods, and was within its implied powers to help its authorized business. * * *

"But aside from the proposition of whether the contract was *ultra vires*, no matters of public policy being involved, it is the rule that where a contract has been performed on one side, the other party is estopped from setting up the defense of *ultra vires*. The rule operates not only as against the corporation, but also in favor of the corporation as against the other party. 10 Cyc. p. 1160.

"'Parties may also be estopped in some cases, from disputing the validity of a corporate contract when it has been fully performed on one side, and when nothing short of enforcement will do justice. To quote the language of Comstock, C. J., in *Parish* v. *Wheeler*, 22 N. Y. 494, 508:

"'"The executed dealings of corporations must be allowed to stand for and against both the parties, when the plainest rules of good faith so require."' *Day* v. *Buggy Co.*, 57 Mich. 151.

"'The plea of *ultra vires* should not as a general rule prevail, whether interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong.' *Timm* v. *Brewing Co.*, 160 Mich. 371, 374.

"See, also, cases cited in plaintiff's brief, and *Blackwood* v. *Chamber of Commerce*, 178 Mich. 321, 324.

"The contract at bar was fully understood by the parties. It was performed in all respects for six years. Defendant has received certain raises in salary and relief from other duties on account of his work under the contract. He performed his work thereunder on the time which belonged to the plaintiff and which the plaintiff paid him for. That he fully recognized his obligation to turn over the brokerage fees to the plaintiff is shown by the surreptitious manner in which he retained them. The contract has been fully performed

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by the plaintiff. All obligations have been fulfilled except those of the defendant. Justice would not be served by permitting defendant to retain all the benefits of a performance of the contract by the plaintiff and all the benefits of a breach of it by himself. He is estopped from now claiming the contract to be *ultra vires.*"

Judgment having been entered upon the verdict, the defendant entered a motion for a new trial based upon the following reasons:

1. The court erred in holding that plaintiff was entitled to recover from defendant the fees which he had earned as a customs broker.
2. The court erred in holding that it was not *ultra vires* for plaintiff to hire a man and require him to do the customs brokerage business.
3. The court erred in holding that there was a consideration for the claimed contract requiring defendant to turn over his customs brokerage fees.
4. The court erred in rendering judgment for plaintiff when the testimony shows that the Minneapolis, St. Paul & Sault Ste. Marie Railway Company was equally interested with plaintiff, and was not a party.

The trial court filed its reasons for denying said motion, and in disposing of the fourth reason the following was said:

"The court did not err in rendering judgment for the plaintiff, as claimed in the fourth ground of the motion to set aside judgment, because it appears from the statement of facts that the contract made with the defendant for the accounting for his brokerage fees was made by the plaintiff and all of the dealings of the defendant relative to such brokerage fees were had with the plaintiff.

"The arrangement made between the plaintiff and the Minneapolis, St. Paul & Sault Ste. Marie Railway Company are of no consequence in determining the liability of the defendant to the plaintiff for such fees. The question of the interest of the M., St. P. & S. S. M. Ry. Co. in this suit was first presented in the present motion. Aside from the question of its not

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being of any consequence in this cause, it appears to the court that the non-joinder should have been raised in a different way."

Defendant duly excepted to the denial of the motion, and has brought the case here upon writ of error; and error is assigned upon the several rulings discussed.

In this court it is not claimed by defendant that he was a public officer; but it is his contention that there was no contract entered into between himself and the plaintiff, which would constitute a legal assignment of his fees. And that if there was a contract entered into it was *ultra vires*, because a railroad company cannot enter into a customs brokerage business.

In passing the question of a public officer, it may be said that upon its facts, the instant case is readily distinguished from the case of *Bailey* v. *Quarry Co.*, 166 Mich. 321, where the salary of a postmaster was involved.

We are of the opinion that the cases cited by defendant relating to the contract and the rule governing assignment of his fees or earnings, do not apply to the facts here shown. It is rather a case where an agreement was made as to the manner in which fees earned by defendant should be disposed of, and therefore not void as against public policy. *McGregor* v. *McGregor*, 130 Mich. 505, and cases there cited. If the rule there stated could apply to a public officer, much more is it applicable here.

We agree with the learned circuit judge that the transaction in the instant case, "more properly falls within the general rule that all the time and labor of the employee belongs to the employer during the hours of service," especially where, as in the instant case, "the defendant promised to remit such fees as were earned by him as customs broker, and this agreement has never been changed." In our opinion there is no question of public policy here involved. We have ex-

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amined *Deaton* v. *Lawson,* 2 L. R. A. (N. S.) 392 (40 Wash. 486), *State* v. *Norton,* 67 Iowa, 641, and kindred cases cited by defendant, but do not think them pertinent here.

It is manifest that the contract in question contained no engagement on the part of the plaintiff to do anything, for which a license was required. It assumed none of the duties of a customs broker. The contract was between the plaintiff and the defendant with reference to the disposition of the fees arising from such employment.

If it were to be held that the contract amounted to an assignment, it was valid.

"An assignment of wages to be earned in the future, under an existing contract, is valid." *Rodijkeit* v. *Andrews, supra,* and cases cited, including Michigan cases.

Upon the subject of *ultra vires,* we do not deem it necessary to add to what was said by the learned circuit judge in his charge, except to note the fact that the defense of *ultra vires* was not pleaded in the instant case. See collection of Michigan authorities upon the subject, as well as upon the general doctrine applicable to like situations, in *Blackwood* v. *Chamber of Commerce,* 178 Mich. 321.

An examination of the authorities cited and of the charge of the court, satisfies us that there is no error in the record, and the judgment below is affirmed with costs to appellee.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, and FELLOWS, JJ., concurred. KUHN, J., did not sit.

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ZEIGEN *v.* ROISER.

1. HUSBAND AND WIFE—ESTATES BY ENTIRETIES—CONVEYANCES—INTEREST IN LAND.

An assignment of a contract interest in land, held by a husband and wife by the entireties, signed by the husband alone, is void.

2. SPECIFIC PERFORMANCE—CONTRACT TO CONVEY—EXCHANGE OF PROPERTY—EQUITY—BURDEN OF PROOF.

In proceedings for the specific performance of a contract to exchange equities in land contracts, where there is an irreconcilable conflict in the testimony of the various parties, evidence examined, and *held*, to sustain the finding of the court below that plaintiff had failed to sustain his case by the burden of proof.

Appeal from Oakland; Smith, J. Submitted January 18, 1918. (Docket No. 152.) Decided March 27, 1918.

Bill by Frederick H. Zeigen against Charles H. Roiser and wife, Florence S. Fox, and others, for the specific performance of a land contract. From a decree for defendants, plaintiff appeals. Affirmed.

Jerome Probst and *Pelton & McGee*, for plaintiff.

Covert & Campbell, for defendants Roiser.

Charles R. Robertson, for defendant Fox.

STONE, J. This case presents mainly questions of fact, which are much in dispute.

1. By his bill of complaint, plaintiff claims that in March, 1914, he was the owner of the interest of the vendee in a certain land contract made in 1906, by Henry F. Barnard of the first part, wherein and whereby said Barnard agreed to sell and convey to one Susan Gibbs, as party of the second part, certain

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described lots known as Nos. 74-76 Prentis avenue, in the city of Detroit—said land contract being duly assigned to the plaintiff.

2. That in January, 1912, John Rich and wife, as parties of the first part, had made a certain land contract with the defendants Charles H. Roiser and Alice L. Roiser, his wife, of the second part, wherein and whereby said Rich and wife had agreed to sell to said defendants a certain parcel of land in the township of Royal Oak, county of Oakland, known as the 20-acre tract, duly described, on section 33 of said township.

3. That, on or about March 1, 1914, negotiations were entered into by and between the plaintiff and said defendants Roiser and wife, for the purpose of exchanging the equity of the plaintiff in said Prentis avenue property, for the equity of said defendants in said 20-acre tract in Royal Oak township, aforesaid; that such negotiations continued until on or about March 15, 1914, when they orally agreed to exchange said equities in said properties, said defendants Roiser and wife to take said Prentis avenue property, subject to an unpaid balance on said Barnard contract of $13,000 which they assumed and agreed to pay, and plaintiff to take said land in Royal Oak township subject to $3,500 unpaid upon said Rich contract. Each party to furnish abstracts.

4. That afterwards and on or about March 20, 1914, and in pursuance of the aforesaid verbal agreement, said defendants Roiser and wife, delivered to the plaintiff the aforesaid Rich contract, together with an assignment of said contract by said defendants Roiser and wife to the plaintiff, attached to and made a part of said contract, and a copy of the said assignment, signed by the said parties is set forth.

5. That at the time of the delivery of said Rich contract and assignment thereof to the plaintiff, he

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delivered said Barnard contract duly assigned to said defendants Roiser and wife; but that at the request of said defendants said Barnard contract with assignment was returned and delivered to the plaintiff for safe keeping until abstracts should be furnished of said respective properties, and the titles made good.

6. That afterwards, it appearing that there would be some delay in getting said abstracts perfected, a written memorandum was made between said defendant Charles H. Roiser, acting for and on behalf of himself and wife, and the plaintiff, evidencing the terms and conditions of their said verbal agreement to exchange, as aforesaid, as to the furnishing of abstract and making good title to said properties, as well as in the settlement of differences on said exchange, specified in said oral agreement, a copy of which agreement, bearing date April 4, 1914, was attached to the bill of complaint, and being recorded in the office of the register of deeds of Oakland county, April 28, 1915.

7. That on or about December 10, 1914, said defendant Charles H. Roiser called at the office of the plaintiff, and asked to have said Rich contract a few days for the purpose of having said Rich indorse thereon all payments made thereon, so as to know the exact figures, and be able to figure the differences on said exchange, promising to return said contract, with all payments duly indorsed thereon, to the plaintiff, in a few days thereafter; that, relying upon said statement and promise, the plaintiff loaned said contract to said defendant Roiser; that about a week thereafter the plaintiff met and asked said defendant about the return of said contract, and he replied that he had been unable to find said Rich at home, but would do so soon, and would return said contract to the plaintiff within a week or two thereafter; but that he has never returned said contract to the plaintiff, but, on

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the contrary, said defendant Charles H. Roiser, after tearing off said assignment thereof to the plaintiff, delivered said contract to the defendants A. O. Greenough and John J. Hagelstein, to whom said defendants Roiser and wife sold said 20-acre parcel on or about December 10, 1914. That said reason was a mere pretext; that at said time said Roiser had received an offer of a higher price for said land, and planned to obtain said contract and assignment thereof from the plaintiff by deceit and trickery. That the plaintiff has repeatedly asked said defendant Roiser for said contract, but he has refused to return the same.

The bill alleges that on or about November 17, 1915, said Rich, then a widower, executed and delivered to defendants Charles H. Roiser and Alice L. Roiser a warranty deed of the Royal Oak property in fulfillment of said contract; that on the same day said defendants deeded said premises to defendants Greenough and Hagelstein, and that the last-named defendants on the same day conveyed said property to defendant Florence S. Fox. That said purchasers had notice of plaintiff's rights and interest in said land, or knowledge of facts sufficient to put each of them on notice as to plaintiff's rights therein; that said last mentioned deeds were collusive and merely pretended, for the purpose of placing said land beyond the reach of the plaintiff, and that defendant Fox took said deed to her as a mere "dummy," and holds the same in trust for the other defendants; that very little money changed hands on said transfers, the pretended purchase prices being paid largely with mortgages, the amounts of which are set forth.

The bill further alleges that defendant Roiser and wife furnished plaintiff only the original abstract, which was not perfected; that the plaintiff was satisfied with the title; that he furnished the said defendant Roiser with an abstract of said Prentis avenue

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property; that he expressed himself as satisfied with the same, and that the said exchange had been closed so far as the plaintiff was concerned, excepting only as to the figuring up and adjusting on a cash, or other satisfactory basis of the difference of taxes, interest on said properties, and balance unpaid on said contracts; and that plaintiff has been ready, able and willing to perform all things by him to be performed under said agreement; but said Roiser and wife refused, and still refuse, to arrange said difference according to said contract, and refuse to return said Rich contract with assignment thereof to the plaintiff, as agreed.

It is further claimed that all agreements to sell said premises to the other defendants, as well as said deeds, were subject to the prior sale by said defendant Roiser and wife to the plaintiff of said property.

The bill prays that an accounting may be had and taken of the difference to be paid by said parties on their said exchange, so as to make the land contract on said Prentis avenue property leave an unpaid balance of $13,000, and to leave an unpaid balance on said Rich contract of $3,500, according to said agreement to exchange said properties; also of the difference to be paid on and for taxes on said exchange to carry out the terms thereof.

That said Charles H. Roiser and Alice L. Roiser be required to surrender and deliver to the plaintiff said Rich contract with said assignment thereof, and that the plaintiff be declared to be the owner and holder of said contract, and of said land subject to the payment of said $3,500 with interest. which the plaintiff thereby offers to pay.

That the defendant Fox be required to execute and deliver to the plaintiff a deed of said land, and that the deeds and mortgages above described (excepting only said deed from Rich to Roiser) be declared null

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and void and wholly inoperative as against the plaintiff's rights in the premises.

He prays for an injunction restraining defendants from conveying or mortgaging said land, and for general relief.

The answer of the defendant Charles H. Roiser denies each and every allegation of paragraphs 2, 4, 5, 6 and 7 of said bill of complaint, and alleges an entirely different state of facts relating to his dealings with the plaintiff. He avers that on the 4th day of April, 1914, he borrowed from plaintiff the sum of $150, and at the same time gave to plaintiff his 30-day note therefor, a copy of which note was attached to the answer. That at the time of the making and delivering of said promissory note said defendant left with the plaintiff, as collateral security for said loan, said Rich contract, and that said defendant received a receipt for said land contract from the plaintiff which remained in the possession of the plaintiff up to the time of the payment of said promissory note, on to wit, the 21st day of December, on which said date said Rich contract was returned and delivered to said defendant by the plaintiff. That on the same date said defendant and his wife borrowed the sum of $600 from one William Lakin, and gave to said Lakin a 90-day promissory note, and as collateral security to said Lakin, said defendant and wife deposited said Rich contract with said Lakin, and that said land contract remained in the possession of said Lakin approximately up to the time of the sale of the premises to said Greenough and Hagelstein.

He admits that on April 4th he alone entered into a written agreement with the plaintiff to exchange the interest of said defendant in said premises described in the Rich contract for the interest of said plaintiff in said Barnard contract; that at the time of the execution of said agreement between this defendant and

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the plaintiff for the exchange of said properties, this defendant had it in mind that if said premises, known as No. 74-76 Prentis avenue, were as represented by the plaintiff, this defendant would then take the matter of the exchange of said properties up with his said wife, Alice L. Roiser, and would endeavor to induce her to join him in an agreement with the plaintiff for the exchange of said properties; that the said plaintiff then had in his possession the said Rich land contract, and well knew that the said land contract was for the purchase of said property by this defendant and his wife, Alice L. Roiser, by entirety, from said Rich and wife; and said plaintiff well knew at the time of the execution of said agreement of April 4th, that this defendant could not make any binding agreement in reference to the proposed exchange of said property; that said agreement was merely a preliminary one; that plaintiff then owed upon said Barnard contract a balance of about $13,900; and later said plaintiff repeatedly stated to this defendant that he could not arrange the payment of said $900 on said land contract, and admitted that it was not in his power to carry out his terms of said agreement, and finally suggested to said defendant that a new agreement be entered into between them for the exchange of other property for said Rich contract, but that said deal was never consummated; and that the plaintiff from the time of the payment of said promissory note, on said 21st day of December, 1914, treated said agreement of April 4th as of no further force and effect.

That this plaintiff, as complainant, filed a bill of complaint in the circuit court for the county of Oakland, in chancery, against this defendant alone, to enforce specific performance by this defendant of said agreement of April 4, 1914; that said case was put at issue, but was later discontinued by the complainant.

In that bill of complaint no reference was made by

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the plaintiff to any assignment of said contract, nor was any claim made that said defendant Roiser and wife had ever signed any assignment of said Rich contract to the plaintiff; but that later, and on February 7, 1916, the present bill of complaint was filed, in which, for the first time, reference was made to the assignment of said contract; that the plaintiff at all times knew that the land contract for the purchase of said Rich premises was held by entirety by this defendant with his wife, Alice L. Roiser, and that the same was occupied by them as a homestead, and that it was not in the power of this defendant to convey alone any interest in said premises.

The separate answer of the defendant Alice L. Roiser consists of a general denial of the main allegations of the bill of complaint.

The answer of the other defendants is to the effect that they are *bona fide* purchasers, without notice, of said premises.

From what we have stated it is very apparent that the crucial and decisive question in the case is whether the defendant Alice L. Roiser ever signed the assignment of the Rich contract with any intention of exchanging the property therein described for the plaintiff's equity in the Barnard contract.

There is great conflict in the evidence in the case, the parties not agreeing upon any material matter.

The learned circuit judge, who heard the evidence and saw the witnesses, found that there was so much uncertainty surrounding the signing and execution of said assignment by defendant Alice L. Roiser that he would not pass a decree against her, and that there was nothing else in the case binding her to carry out an exchange of the properties; and, it being conceded by plaintiff's counsel that a decree should not pass against any of the defendants unless Mrs. Roiser was included, he dismissed the bill of complaint, without

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prejudice to the plaintiff to bring an action at law against the defendant Charles H. Roiser. The plaintiff has appealed.

The testimony in the case is voluminous, but we have read the same with care, as well as all of the documentary evidence. Upon the hearing of the cause it was the claim of the defendants Charles H. Roiser and Alice L. Roiser, and they gave evidence tending to support the claim, that they were the occupants of said premises in Royal Oak township and had an equity therein, and that the plaintiff had an equity in the premises known as 74-76 Prentis avenue, with an apartment house thereon. It also appeared that the plaintiff owned some real estate next to the Roiser homestead in Royal Oak township, and had previously made a contract with Roiser to handle the same. There is no question that there was an interview between the plaintiff and Charles H. Roiser in the latter part of March, having in view an exchange of these properties. It was the claim of the defendant Charles H. Roiser that at this time his contract was in the hands of one Bolles, who had an agreement with defendant Roiser and his wife for the purchase of the property, dated in October, 1913. At the time the negotiations concerning the exchange of said properties were in progress, it became necessary for Roiser to borrow some money to pay some interest on an indebtedness of his to avoid the foreclosure of a mortgage. It is his claim and that of the witness Bolles, that he went to Mr. Bolles and obtained possession of the said Rich contract; that on the day following, to wit, April 4th, Roiser borrowed from the plaintiff $150, the same being represented by a check on the Peoples State Savings Bank, payable to the order of Charles H. Roiser, and signed by Zeigen Construction Company, Frederick H. Zeigen, Manager. This loan was evidenced by a note given by Roiser to the plaintiff for said

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sum, dated April 4, 1914, payable 30 days after date, across the end of which was written: "Land Contract on S. W. Cor. of E. ½ S. E. ¼ of Sec. 33, Royal Oak Twp. assigned as collateral."

Roiser also testified that he deposited with the plaintiff the Rich land contract which he had received from Bolles the day before, as collateral security for said loan and took plaintiff's receipt for the same, dated April 4, 1914, reading: "Received of Chas. Roiser. Land contract on N. E. cor. Mill road and Eight-Mile road, as collateral security for note of $150," and that he delivered to the plaintiff a blank assignment which he had some time before cut from a Burton contract, and had had his wife sign in blank in case Mr. Bolles needed it to complete any deal which he might make; that this assignment was in blank with the exception of the name of Alice L. Roiser, and that he, Roiser, added his signature to it before turning it over to the plaintiff; that at the time it went out of his hands it had simply the two signatures upon it, and, except the printing, there was no other writing thereon. He claims that it was the intention that this contract was to be in the hands of the plaintiff as collateral for said loan only. It is not denied by the defendant Charles H. Roiser that on the same day, April 4, 1914, he alone had the negotiations with the plaintiff in relation to the proposed exchange of properties which culminated in the agreement of that date; Mrs. Roiser not being a party thereto or in any other way alluded to in said contract. He further testified that the note was given for the loan of $150, and did not have anything to do with the balancing up of differences on the proposed exchange of property. He further testified that the plaintiff never tendered to him any assignment of his interest in the Prentis avenue property, and never tendered to, or showed him any abstract of that prop-

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erty; and that the plaintiff never afterward told him that he was ready to go on with the deal.

It further appears that under date of November 27, 1914, the plaintiff, upon one of the letter-heads of his company, wrote to the defendant Charles H. Roiser a letter stating:

"Your note for $150 is long overdue, and as there does not seem any hope of making other arrangements, kindly call and pay same or sign a new and regular banking collateral note to replace the other."

Roiser also received letters from plaintiff dated December 8 and 17, 1914, reading, respectively, as follows:

"Kindly call at this office and sign note. If you do not do this we will have to take necessary steps to foreclose previous note."

The other:

"Kindly call at once with that note, must have it today so I can square up my books."

Inclosed with one of said letters was an unsigned collateral note dated December 1, 1914, for the sum of $150 payable 30 days after date, to the order of Fred H. Zeigen, and mentioning the deposit and pledge with him, as collateral security for the payment of said note and any other indebtedness, the Rich contract. These letters were on letter-heads of the Zeigen Construction Company, and signed by typewriter.

It appears that on December 21st, Roiser paid the $150 and interest by a check for $156, dated December 21, 1914, and it is the testimony of the defendant Roiser that at that time the Rich contract was returned to him by the plaintiff; that he did not open said contract at the time it was returned to him, but on his return home he opened it and found the assignment filled out and attached to it by glue. Roiser claims that he then, in the presence of his wife, tore

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off the assignment from the Rich contract, and soon thereafter he assigned it to William Lakin, from whom he borrowed money.

It is undisputed that on July 8, 1915, the plaintiff, as complainant, filed a bill of complaint against the defendant Charles H. Roiser alone, for the specific performance of the contract of April 4, 1914. Mrs. Roiser was not made a party thereto, nor was there any allusion to the claim that an assignment had ever been made or signed by her.

Upon learning the fact that Mrs. Roiser had not been a party to said contract, that suit was discontinued. There is no question that during all these claimed negotiations the plaintiff knew that the interest of the defendant Roiser and wife in the premises described in the Rich contract was that of owners by the entireties, and that the said premises were at all times occupied by said defendants as a homestead.

The defendant Mrs. Roiser testified that she had had no acquaintance with the plaintiff, and had never seen him until the hearing. He had testified that he knew her and had called at the said defendants' home on the premises in Royal Oak township and had talked with her about the exchange of the properties. She was shown the said assignment; the following occurred:

"*Q.* Now, I hand you exhibit 2 which has your name, Alice L. Roiser, on it, and will ask you if that is your signature?

"*A.* Yes, sir. At the time I signed it, it had nothing but my signature and the printing. It, exhibit 2, at that time was a paper by itself, and was not attached to any other paper.

"*Q.* Now I show you a place on exhibit 1 (Rich contract) where it purports to be attached. Was exhibit 2 pasted on exhibit 1 when you signed it?

"*A.* It was not.

"*Q.* Was the land contract, exhibit 1, present when you signed that?

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"*A.* It was not. I did not sign exhibit 2 with any intention of transferring to Fred H. Zeigen any interest in our property, the 21-acre farm.

"*Q.* Did Mr. Roiser, your husband, say to you when he asked you to sign this what he was going to do with it?

"*A.* He thought he might need my signature to borrow $150 from Mr. Zeigen.

"*Q.* Was his signature on there when you signed it?

"*A.* No, sir. I remember seeing exhibit 2 attached to exhibit 1 after Mr. Roiser brought it back from Mr. Zeigen. He did not know it until he got it in the house. He opened it in front of me and found out. That was about April 4th; I think it was on the 3d.

"*Q.* When you say Roiser brought exhibit 2 attached on the contract exhibit 1, was it before or after the note for the money had been paid? (No answer.)

"*Q.* Did you know about borrowing this $150.

"*A.* Yes, sir. Mr. Roiser did not have the note with him, exhibit D, when he showed me exhibit 2.

"*Q.* Do you know whether he showed you the note at that time?

"*A.* I don't remember."

There is no claim that any consideration passed to Mrs. Roiser. The claimed assignment of the Barnard contract was to Charles H. Roiser alone. The plaintiff's testimony tended to support the allegations of his bill of complaint.

There is an irreconcilable conflict in the testimony of these various parties. It is manifest that there was either false testimony, or that some of the witnesses were at least greatly mistaken in their testimony. The circuit judge saw these witnesses and heard them testify. There are some things in the conduct of the parties which have controlling influence in disposing of the case. The plaintiff appears to be a man of intelligence and acquainted with business affairs. He was a prolific letter writer and put in evidence many of his own letters, which were self-serving in their character, and have no probative force. His conduct

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in filing the first bill of complaint against the defendant Charles H. Roiser alone, without making any claim that he had, or ever had had in his possession, any assignment of the Rich contract signed by Mrs. Roiser, is very significant. It is almost inconceivable that a man possessing his acquaintance with real estate affairs, and knowing as he did that the premises were held by said defendants as tenants by the entireties, that he should not have seen and appreciated the importance of alleging the possession of the assignment of Mrs. Roiser if he supposed at that time any such paper was in existence, or that it was intended to be used in the proposed exchange of properties.

Full faith and credit cannot be given to the testimony of these parties as a whole upon either side; but, after a careful examination of the entire record, we find ourselves in so much doubt as to whether Mrs. Roiser ever signed the assignment with the intention that it should have the effect of assigning to plaintiff the Rich contract, in exchange of that property for the Barnard property, that we are constrained to agree with the trial court in holding that the plaintiff has not sustained the burden of proof resting upon him, and that the decree below should be affirmed.

It is hardly necessary to refer to authorities in support of the proposition that property held as this property was, could not be conveyed, or any interest therein conveyed without the wife joining with the husband. We need cite but a single case, that of *Auditor General* v. *Fisher*, 84 Mich. 128, and cases there cited, where it is held, in substance, that the interest of a husband and wife in a land contract in which their names appear as vendees, is an entirety and not a tenancy in common. This view of the case renders it unnecessary to consider whether the other defendants are *bona fide* purchasers or not of these premises.

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There are innumerable circumstances upon both sides which we have considered and that might be referred to, but it is sufficient to say that, in our opinion, the plaintiff has failed to make out a case against defendant Alice L. Roiser, and that the decree below should be affirmed with costs to the defendants.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

PEOPLE *v.* WILLIAMSON.

1. NEW TRIAL—APPEAL AND ERROR—EXCEPTIONS.
   A motion for a new trial, where the record is silent as to its disposition, and there are no exceptions to any refusal to grant such motion, will not be reviewed by the appellate court.

2. CRIMINAL LAW—CARRYING CONCEALED WEAPONS—INTENT.
   The intent required to make one punishable under the statutes against carrying concealed weapons, is an intent to do the act prohibited, viz., to carry weapons concealed upon the person; the ultimate purpose being immaterial.

3. SAME—TRIAL—CONCEALMENT—INTENT—INSTRUCTIONS—GIST OF OFFENSE.
   In a prosecution for carrying concealed weapons under Act No. 274, Pub. Acts 1911, as amended (3 Comp. Laws 1915, § 15236), where the court, in his charge to the jury, repeatedly called their attention to the question of concealment, asking, "Did the defendant have the gun on his person concealed as stated by the people's witnesses?" it is not open to the objection that the court did not suffi-

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ciently define the offense charged, since concealment implies an assent of mind and purpose.

4. SAME—LOADED WEAPON—GIST OF OFFENSE.

The authorities are agreed that a revolver or pistol need not be loaded to come within the statute against carrying concealed weapons.

Error to the recorder's court of Detroit; Jeffries, J. Submitted January 17, 1918. (Docket No. 189.) Decided March 27, 1918.

Robert Williamson was convicted of carrying concealed weapons and sentenced to imprisonment for not less than six months nor more than two years in the Detroit house of correction. Affirmed.

A. W. Sempliner and *P. W. Grose*, for appellant.

Alexander J. Groesbeck, Attorney General, *Charles H. Jasnowski*, Prosecuting Attorney, and *De Witt H. Merriam*, Assistant Prosecuting Attorney, for the people.

STONE, J. The defendant was convicted in the recorder's court of the city of Detroit of the offense of wilfully and unlawfully going armed with an offensive and dangerous weapon, to wit, a revolver concealed upon his person at the city of Detroit on April 13, 1917, not then and there having a license to go armed, in violation of the provisions of section 15236, 3 Comp. Laws 1915, being Act No. 274 of the Public Acts of 1911, as amended; the title of the act being in part as follows:

"An act to prohibit the sale, keeping for sale, loaning, giving away or carrying of certain dangerous weapons; to prevent the carrying of concealed weapons except in certain specified cases when a license is issued therefor; to provide punishment for the violation of the provisions hereof," etc.

The provisions of said section applicable to the case are as follows:

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"It shall be unlawful for any person, except as hereinafter provided, to go armed with a * * * revolver * * * or other offensive and dangerous weapons or instruments concealed upon his person."

Upon the trial of the case the sole testimony (except that of the proper officer that no license to carry concealed weapons had been issued to defendant) was that of a police officer who testified that he arrested defendant about 3:10 p. m. of April 13, 1917, in the city of Detroit. And further:

"I searched him and found that gun on him. (Gun produced and marked exhibit 1, and offered in evidence.) He had the gun in his inside pocket on the right-hand side of his coat. The pocket was a short pocket, up high. I could not see it. I asked him what authority he had to have a revolver. He said he had no authority. He had a badge on, 'Metropolitan Detective Agency.' He said there was a foreigner down there going away with some woman."

On cross-examination the witness testified:

"I examined the gun as soon as I saw it. It was not loaded, and he did not have any cartridges upon his person."

Thereupon the people rested, and there was no evidence offered on behalf of defendant.

Among other things, the trial court charged the jury as follows:

"Now, gentlemen, the law prohibits any person from carrying any weapon that is a dangerous weapon, such as a dagger, sword, pistol, revolver, metallic-knuckles, pocket-billy, sand-bag, skull-cracker, slung shot, razor, without a permit; in fact, no person is allowed to carry any weapon that is concealed, without a permit, coming within the meaning of the statute. * * *

"Now this is a very simple issue in this case. Did the defendant have the gun concealed as stated by the people's witness, and if he did, did he have a permit to carry a gun, or to carry one from the proper authorities? If you find that he had this gun on his

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person concealed as testified to by the people, and you believe that beyond a reasonable doubt, it makes no difference, gentlemen, whether it is loaded or unloaded. If you believe that it (the gun) was found upon his (respondent's) person, as testified to by the people, and you believe, further, beyond a reasonable doubt, that he had no permit to carry this gun, then your duty, gentlemen of the jury, if you believe that beyond a reasonable doubt, is to convict this defendant on the charge in the information. * * *

"I will charge you, gentlemen of the jury, that as a matter of law, that it makes no difference whether the gun was loaded or unloaded. If you find that he was carrying it, and carrying it concealed, as I told you, beyond a reasonable doubt, it is your duty to convict him; if you further find, as I have already said to you, that he had no permit to carry one."

There was a motion to direct a verdict of not guilty for the reason that the weapon was not loaded, and that no harm was intended, and that it was not a dangerous weapon, which motion was refused.

After defendant's conviction he was sentenced to be confined in the Detroit house of correction for a period of not less than six months nor more than two years, with a recommendation that he serve six months. There was a motion for a new trial; but the record is silent as to whether the motion was ever heard or not, and there are no exceptions to any refusal to grant such motion. We cannot, therefore, consider such motion.

The defendant has brought the case here upon writ of error, and error is assigned upon the parts of the charge above set forth. Also, that the court erred in refusing to direct a verdict of not guilty on the ground that there was no evidence that the defendant did go armed with a dangerous weapon, and, also, upon the ground that the weapon was not loaded, and was not a dangerous weapon.

Counsel for defendant contend that a distinction

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should be made between "carrying a concealed weapon" and "going armed with a concealed weapon." In our opinion, if a person knowingly carries a dangerous weapon concealed upon his person, he is, within the meaning of the statute, going armed with a dangerous weapon concealed upon his person.

It is also urged that under the statute a material element of the offense is the unlawful or felonious intent with which the weapon is carried, and that no such intent was shown in the case. The farthest any of the authorities go, is that the intent required to make one punishable under the enactments against carrying concealed weapons, is an intent to do the act prohibited by the statute, viz.: to carry weapons concealed upon the person, and that the ultimate purpose is immaterial. See 5 Am. & Eng. Enc. Law (2d Ed.), p. 734 *et seq.*, and cases cited in notes.

While there is a diversity of holdings in the different States, depending largely upon varying local statutes, the great weight of authority is to the effect that the intent, or purpose with which the weapon is carried, is not an element of the statutory offense. Of course, if the weapon was carried upon his person through restraint or ignorance, that would be a good defense to the prosecution. But nothing of that kind is claimed in the instant case. The following cited cases are in point upon this question: *State* v. *Williams*, 70 Iowa, 52; *Walls* v. *State*, 7 Blackf. (Ind.) 572; *Ridenour* v. *State*, 65 Ind. 411; *Cutsinger* v. *Commonwealth*, 70 Ky. 392; *Strahan* v. *State*, 68 Miss. 347.

In the last cited case, the sheriff gave his pistol to defendant for the purpose of having it repaired. Defendant was accustomed to do such jobs, and after receiving the pistol carried it to his home two or three miles distant, and afterwards at the owner's request brought it back. While on his way, he carried the

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pistol in his pocket for the sake of convenience. The trial court refused an instruction asked by defendant that the jury should acquit, under the foregoing facts. It was held by the supreme court that the trial court properly refused the instructions asked by the defendant, and that the verdict of guilty was sustained by the evidence. The court said:

"The defendant did the act forbidden by the statute, which makes the prohibited *fact* and not the *intent* criminal." Citing cases.

In *State* v. *Martin*, 31 La. Ann. 849, it was held that on the trial of an accused for carrying a pistol concealed on his person, the evidence to show that the pistol belonged to another, that the owner placed it in the hands of the accused merely to get cartridges for it, and that the accused owned no pistol and had never been known to carry one, was not admissible.

"The defendant was indicted for having carried concealed on or about his person, a pistol. He was found guilty, sentenced, and has appealed. It appears, by bill of exceptions, that on his trial he attempted to prove that the pistol had been placed in his hands, by the owner, for the sole purpose of procuring cartridges that would fit it, and that he—accused—had had no pistol, and had never been known to carry one, either concealed or otherwise before that day."

The district attorney objected to the evidence sought to be elicited, on the ground that, in this case, the sole issue raised by the indictment was as to the concealment of the weapon, and that no evidence could properly be admitted to negative criminal intent. The court sustained the objection and correctly refused to admit the evidence.

"To commit the crime charged, it suffices that a dangerous weapon be carried concealed about the person, it matters not whether it be so carried with or without any actual intent."

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In *Scott* v. *State*, 94 Ala. 80, it was held that a conviction might be had for carrying weapons concealed on or about the person if proved that the defendant, when arrested on account of suspicious conduct by an officer, who had a warrant of arrest for another person, had a pistol concealed in one of his pockets.

French v. *State*, 94 Ala. 93. A conviction may be had for carrying concealed weapons, on proof that the defendant when arrested had them concealed upon his person. See, also, *Chastang* v. *State*, 83 Ala. 29.

Goldsmith v. *State*, 99 Ga. 253. Held that one who transports a pistol from a shop where it has been repaired, although he does so at the request of the owner, and for the sole purpose of delivering to the latter, is guilty of the offense of carrying a concealed weapon, if, in the act of transporting the pistol, he carries it concealed upon his person.

State v. *Dixon*, 114 N. C. 850. The offense of carrying a concealed weapon consists in the guilty intent to carry the weapon concealed, and does not depend upon the intent to use it; therefore, where in the trial one charged with carrying concealed weapons, on testifying that he carried it for the purpose of selling it, the trial judge properly instructed the jury in effect that there was no evidence to go to the jury to rebut the presumption of guilt which the statute raised from the possession about his person, and off his own premises, of a concealed deadly weapon. (*State* v. *Harrison*, 93 N. C. 605, is overruled.) The court said:

"The object of this statute is not to forbid the carrying of a deadly weapon for use, but to prevent the opportunity and temptation to use it arising from its concealment. If the weapon is carried for lawful use, and even for unlawful use, the defendant would not be guilty under this section if the weapon is carried openly, since this statute applies not to the act of carrying the weapon or the purpose in carrying it, but to the manner of carrying it."

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In Missouri, in the two cases of *State* v. *Roberts*, 39 Mo. App. 47, and *State* v. *Murray*, 39 Mo. App. 127, the court seemed to hold that if the weapon is carried for the purpose of sport, or for the purpose of delivering it to its owner, the act is not criminal.

To the same effect is *State* v. *Larkin*, 24 Mo. App. 410, and there are Texas cases holding the same doctrine. But the great weight of authority is that intent is not material, if it appears that there was concealment, which is a material fact. *Ridenour* v. *State*, *supra*.

A similar rule has obtained in this State relating to criminal trials for keeping saloons open on prohibited days. *People* v. *Roby*, 52 Mich. 577, is such a case. There Chief Justice COOLEY said:

"I agree that as a rule there can be no crime without a criminal intent; but this is not by any means a universal rule. One may be guilty of the high crime of manslaughter when his only fault is gross negligence; and there are many other cases where mere neglect may be highly criminal. Many statutes which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible," and a score of instances and reported cases are cited.

In the instant case the trial court repeatedly called the attention of the jury to the evidence upon the question of concealment, asking: "Did the defendant have the gun on his person concealed as stated by the people's witness?" We agree with counsel that concealment implies an assent of mind and purpose, but the word is not a technical one.

We do not think there is any merit in the further claim that the court did not sufficiently define the offense charged. The authorities are agreed that a revolver or pistol need not be loaded to come within

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the statute. *State* v. *Duzan*, 6 Blackf. (Ind.) 31; *Ridenour* v. *State, supra; Gamblin* v. *State*, 45 Miss. 658; *State* v. *Bollis*, 73 Miss. 57.

A careful examination of this record discloses no reversible error, and the judgment of the recorder's court is therefore affirmed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

TACKLES *v.* BRYANT & DETWILER CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—PERSONAL INJURIES—ACCIDENTAL INJURY.

   Before an employee is entitled to recover compensation, under the workmen's compensation law, he must establish the fact that he received an accidental injury which arose out of, and in the course of, his employment.

2. SAME—ACCIDENTAL INJURY—HERNIA.

   Where plaintiff, while performing his usual duties as a civil engineer, helped another employee to lift a heavy block of timber weighing about 200 pounds, as he was accustomed to do whenever necessary, and he did not slip or fall, nor did the timber which he was lifting strike him, and nothing out of the ordinary happened, but, while lifting, he felt a severe burning pain in his right groin, and he continued with his usual duties for a period of about ten days, when he noticed a large swelling at or about the place where he had felt the burning pain, and, on calling a physician, learned that he was suffering from an inguinal hernia, *held*, that plaintiff did not receive an accidental injury within the meaning of the workmen's compensation law.

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Certiorari to Industrial Accident Board. Submitted January 8, 1918. (Docket No. 3.) Decided March 27, 1918.

Charles E. Tackles presented his claim for compensation against the Bryant & Detwiler Company for injuries received in defendant's employ. From an order awarding compensation, defendant and the Zurich General Accident & Liability Insurance Company, Limited, insurer, bring certiorari. Reversed.

Ivin E. Kerr, for appellants.

E. D. Alexander, for appellee.

STONE, J. Certiorari from an order of the industrial accident board awarding compensation to the claimant as follows:

"The sum of one-half the difference between his average weekly wages before the injury, and his average weekly wages which he is able to earn thereafter, during entire period of disability fixed by the statute, and the amount that said claimant is entitled to receive and recover shall be determined by the industrial accident board from time to time, if the parties hereto are unable to agree upon the amount."

The facts in the case are not in dispute, and are in accordance with a stipulation of the parties as follows:

"Whereas, application for adjustment of claim was duly filed by above named applicant and the case brought on for hearing before a committee of arbitration, under date of October 21, 1915, at the Wayne county building, city of Detroit, county of Wayne, State of Michigan, and,

"Whereas, stenographer who took the testimony is unable to furnish the industrial accident board with the transcript of same because her notes have been either lost or destroyed.

"Now, therefore, it is hereby stipulated and agreed by and between the parties in above entitled cause,

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by their present respective attorneys, that the following constitute the facts as given in evidence before the arbitration committee heretofore mentioned:

1. "That on or about the 2d day of December, 1914, one Charles E. Tackles, applicant herein, was an employee of the Bryant & Detwiler Company, a corporation which has become subject to the terms of the workmen's compensation law, so-called, and at that time both the parties hereto were subject to said law.

2. "That on said day, about 2 o'clock p. m., while said applicant herein was performing his usual duties connected with his employment as a civil engineer, it became and was necessary for him, with the assistance of another, to lift a heavy block of timber, weighing approximately two hundred (200) pounds.

3. "That at the time of lifting said timber the applicant herein felt a sharp burning pain in his right groin; that he continued with his usual duties for a period of about ten days, when he first noticed a large swelling at or about the place where he had felt the burning pain; that thereupon he called upon one Dr. George Palmerlee, a physician duly licensed to practice in the State of Michigan, and ascertained from him that he the applicant herein, was suffering from a right inguinal hernia.

4. "That thereupon within three weeks subsequent to the accident, the applicant herein called upon one Mr. Mason, the claim adjuster for the Zurich Insurance Company, who were at that time carrying the compensation risk for the said Bryant & Detwiler Company, and during the course of the conversation the applicant herein mentioned the fact that he had been advised by this physician that his hernia could only be cured by an operation, and that while said Mason made no specific promise to bear the expenses of the operation, the applicant herein requested that he be allowed to continue with his work before submitting to an operation, the request being on the ground that the Bryant & Detwiler Company were badly in need of his servces at that time.

5. "That the applicant thereafter made repeated demands on said Mason that the Bryant & Detwiler Company pay the expense of the operation and compensation for such period as he might be disabled as a re-

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sult of said operation, but that said Mason refused to do so upon the grounds that there was no liability.

6. "That said applicant herein had never, previous to the said second day of December, 1914, suffered from any pain or hernia in or about the right groin or inguinal canal and had not sustained any accident since this 2d day of December, 1914, affecting said right groin or right inguinal canal.

7. "That at the time the applicant herein felt the severe pain in his side, when lifting said heavy weight, he did not slip or fall, nor did the timber which he was lifting strike him; as a matter of fact, nothing out of the ordinary happened, except that the injured man was lifting unusual heavy timber and that he had lifted such timbers before, when other help was not available. Injured man has remained at work continuously since said accident.

8. "That at the time of said accident he was earning twenty-two dollars and fifty cents ($22.50) per week, and on April 5 he received an increase in salary to twenty-six dollars ($26.00) per week."

Appellant's first assignment of error is to the effect that the board erred in holding that claimant received an accidental injury arising out of, and in the course of, his employment, which would entitle him to compensation under the terms and provisions of the compensation law.

It is urged by appellants that the said order was wholly unauthorized, because the record conclusively shows that claimant's alleged injury was not the result of an accident.

It is well settled by our decisions that, before an employee is entitled to recover compensation, he must establish the fact that he received an accidental injury, which arose out of, and in the course of, his employment. *Adams* v. *Color Works*, 182 Mich. 157.

The facts which are material for the determination of this question, in the instant case, are found in paragraphs 2, 3, and 7 of the stipulation.

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It will be noted that while claimant was performing his usual duties, connected with his employment as a civil engineer, it became necessary, with the assistance of another, to lift a heavy block of timber weighing approximately 200 pounds; also that he felt a severe pain in his right groin while lifting, that he did not slip or fall, nor did the timber which he was lifting strike him. Nothing out of the ordinary happened, because he had lifted such timbers before, when such action was necessary in the performance of his duties; and down to the time of the hearing he had remained at work continuously. It seems to us that these facts conclusively show that claimant did not receive an accidental injury within the meaning of the act. We are of the opinion that the question here at issue was squarely determined in the case of *Kutschmar* v. *Manufacturing Co.*, 197 Mich. 146.

In that case the injury complained of was, also, a hernia. There the claimant testified:

"I lifted this beam often, about 90 or 100 times a day. This time I say I was hurt, I did not fall or stumble when I lifted the beam. I picked it right up, and something snapped in my side. I did not fall or stumble. There was nothing unusual about it. The beam was about 1½ inches thick, 3 feet long and weighs about 90 pounds."

In that case Mr. Justice BROOKE said:

"In the case at bar it conclusively appears from the claimant's own testimony that he received no accidental injury. He was engaged at the moment of his injury in his usual and ordinary employment, and in the usual and ordinary way. In the course of such employment it was his duty to lift the iron bar once in about every 15 minutes, about 90 or 100 times a day. We are of opinion that an employee who receives an injury in the nature of a hernia, while engaged in his usual and ordinary employment, without the intervention of any untoward or accidental happening, is not within the provisions of the compensation act, which

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as we have held provides compensation for accidental injury only."

See, also, *Van Gorder* v. *Motorcar Co.*, 195 Mich. 588; *Stombaugh* v. *Fence Co.*, 198 Mich. 445; *Johnson* v. *Mining Co.*, 199 Mich. 218.

The instant case is readily distinguished from *Schroetke* v. *Jackson-Church Co.*, 193 Mich. 616, and like cases. It is not necessary to consider the other question presented.

The award must be set aside and the case reversed.

OSTRANDER, C. J., and BIRD, STEERE, BROOKE, and KUHN, JJ., concurred with STONE, J.

FELLOWS, J. I am persuaded that upon principle this case does not differ in any way from that of *Roach* v. *Wheel Co.*, *ante*, 299. In that case a majority of my Brethren agreed that there was no liability. For this reason I acquiesce in the reversal of the award in this case.

MOORE, J., concurred with FELLOWS, J.

GUTHRIE *v.* DETROIT SHIPBUILDING CO.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ACCIDENTAL DEATH—EVIDENCE.

On certiorari to review an award of compensation by the industrial accident board, under the workmen's compensation act, where the autopsy showed that death resulted from mitral regurgitation, and there was no evidence that anything unusual or fortuitous occurred, and no competent testimony upon which to base the conclusion that the death of plaintiff's decedent was the result of an accident within the meaning of the act, the award of the board will be reversed.

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Certiorari to Industrial Accident Board. Submitted January 25, 1918. (Docket No. 69.) Decided March 27, 1918.

Ada A. Guthrie presented her claim for compensation against the Detroit Shipbuilding Company for the accidental death of her husband in defendant's employ. From an order awarding compensation, defendant brings certiorari. Reversed.

Douglas, Eaman & Barbour, for appellant.

Frederick T. Witmire, for appellee.

STONE, J. This case is here on certiorari to review the action of the industrial accident board in reversing an order of the committee on arbitration, and ordering compensation to be made to claimant.

If compensation should be awarded in this case at all, it would be in the sum of $10 per week for a period of 300 weeks. The sole question is whether any award should be made to the claimant.

Claimant herein is the widow of Dalyrimple Guthrie, machinist, who died on the 30th day of April, 1916, while in the employ of the defendant company. On that day deceased started work at about 7 o'clock a. m., and at 3 o'clock p. m. he had finished one job. After an intermission of two hours, and at 5 o'clock p. m., he started on the job of repairing the steering gear of the steamer City of Alpena, and remained there up to the time of his death at about 11 o'clock p. m. The long working day was not unusual in his employment, as he had worked 31¼ hours on April 21st and 22d. This was about a week before his death. There was necessity of working rapidly on the repairing of the steering gear; and at about 11 p. m., deceased, with two others, was working on the water level deck of the steamer in a room in which

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the temperature was somewhere between 75 and 78 degrees. There were two portholes open and two doors open from this room leading out to the open air, and the boat was lying in the river, moored to the dock. In order to reach the gear which was to be replaced it was necessary for the workman to work on a platform about four feet above the level of the floor. Part of the work consisted in lifting a cover of the gear box, from a position about waist high to the workmen, up over the shaft to a position about shoulder high. This cover was made of metal and weighed somewhere between 150 and 175 pounds. Deceased and two fellow workmen were lifting this cover. After completing a part of the work, deceased started to walk along the platform to change his position. After a lapse of about one or two minutes after deceased had stopped lifting, his fellow workmen heard what they described as a "thud." At the time deceased had been working on one side of the machine, out of range of vision of the two fellow workmen. On walking around to the place where deceased had been working, his coworkers discovered him lying on the floor with a slight bruise under his chin. There was a small quantity of blood on his lips, due, the physician testified, to laceration of the tongue. A doctor was called at once, and on his arrival, about 30 minutes later, he pronounced the man dead from heart failure or apoplexy. At about 7 o'clock the following morning a coroner's autopsy was performed on the deceased, and the cause of death found to be mitral regurgitation.

On September 7, 1916, a committee on arbitration heard and considered the testimony and found that no compensation was due to claimant, and made an order accordingly. The decision of the arbitration committee was reversed on appeal to the full board (the depositions of two additional physicians having

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been taken and submitted to the board), and it entered an order awarding claimant compensation for 300 weeks at $10 per week.

It is the claim of appellant that the order and award of the industrial accident board should be reversed and compensation denied, because the death of deceased was not due to an accident arising out of his employment. The cases relied upon by appellant are: *Kutschmar* v. *Manufacturing Co.*, 197 Mich. 146; *Van Gorder* v. *Motorcar Co.*, 195 Mich. 588; *Stombaugh* v. *Fence Co.*, 198 Mich. 445; *Johnson* v. *Mining Co.*, 199 Mich. 218.

It is, as we understand it, the claim of the appellant that there was nothing about the work, or employment, that was accidental or even unexpected; that the work was proceeding in the manner intended, and that nothing fortuitous occurred while the work was proceeding.

Upon the subject of the place where the men were working, it may be said that it was not even unusual. The undisputed evidence shows that the temperature was from 75 to 78 degrees, which was about what is termed summer heat. The evidence shows that steam had been off for 20 hours, and the room in which the work was being done was ventilated by two portholes, 12 inches by 14 inches in diameter, one on each side, and two large doors, one open to the dock and the other to the river. Claimant's physician testified that the temperature was not an excessive heat and would not have produced death from heart disease. So we repeat, that it cannot be claimed that the temperature in which claimant's decedent was working was unusual or fortuitous.

Upon the subject of strain: Deceased was a machinist, and was employed to do any machine work that the foreman or the superintendent directed him to do. The work that he was doing at the time of his

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death was ordinary work, the same class of work he was doing before, apparently no more strenuous than his other jobs. This cover that they were lifting had been lifted off the shaft by two men earlier in the day. There is no testimony in the record to warrant a finding that there was anything especially heavy about the work deceased was doing. In fact, the testimony of the physician for claimant negatives any such inference. There was no showing in the evidence that deceased made any special effort or strain; he was merely helping to lift the cover, which was not extraordinarily heavy, and there is no testimony that he strained himself, or that the lift was heavier than ordinary. We think, therefore, it cannot be claimed that there was anything fortuitous in the lifting of the cover; and there was nothing fortuitous about the work.

Upon the subject of long hours, it cannot be said that the working day was out of the ordinary. The testimony is undisputed that deceased had worked longer hours before, having worked 31¼ hours on April 21st and 22d.

The burden certainly is on claimant to show that there was an accident; and there was nothing fortuitous in the long working day. No claim is made that the place itself was unsafe or insecure. There was no claim or evidence that the deceased slipped, and there was nothing on the platform that would cause one to slip or fall. The undisputed evidence is that they were just dry planks—not even grease spots upon them. There is nothing from which it can be inferred that the deceased slipped or stumbled. It cannot be assumed that the man made a misstep, and then again assumed that such misstep caused fright, and then again assumed that the fright caused the heart to stop. This would be not only basing an assumption upon an assumption, but would be taking one into the realms of conjecture.

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In *Schroetke* v. *Jackson-Church Co.*, 193 Mich. 616, at p. 627, a number of English cases were referred to and distinguished. Those cases were *O'Hara* v. *Hayes*, 3 B. W. C. C. 586; *Kerr* v. *Ritchies*, 6 B. W. C. C. 419; *Black* v. *Shipping Co.*, 6 B. W. C. C. 720.

It seems to us that the instant case falls within the doctrine of the English cases just referred to.

It is the claim of appellee here that death was due to an accidental injury arising out of the employment of the deceased, and it is said:

"The industrial accident board having found as a fact that the combined circumstances resulted in the death of the deceased, their finding is final and cannot be reviewed, provided, however, that there is any legal evidence produced to support such finding."

Was there any evidence to support such finding? We think there was none. An examination of the finding of the board shows that its decision is based upon and sought to be justified by the following cases: *La Veck* v. *Parke, Davis & Co.*, 190 Mich. 604; *Schroetke* v. *Jackson-Church Co.*, *supra*; *Ramlow* v. *Ice Co.*, 192 Mich. 505.

While the *LaVeck Case* is a borderline case, there was evidence there of overexertion and excessive heat, a condition which was clearly unusual if not fortuitous; and the *Schroetke Case* is clearly distinguished from the instant case. We can arrive at no other conclusion than that the claimant has failed to show, by any evidence, that the death was due to accident. The record is entirely barren of any evidence of an accident.

That an injury received by a workman while engaged in his usual work, without intervention of something unusual or fortuitous, is not an accident, is now so well established by our decisions, that the proposition needs no discussion. *Van Gorder* v. *Motorcar Co.*, *supra*; *Kutschmar* v. *Manufacturing Co.*, *supra*;

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Stombaugh v. *Fence Co., supra; Johnson* v. *Mining Co., supra.*

In all of those cases compensation was denied. They have been so often referred to, and discussed by us, that it is unnecessary here to quote from them.

In our opinion there was no evidence to support the finding of the industrial accident board, and its award and order are reversed.

OSTRANDER, C. J., and BIRD, STEERE, and BROOKE, JJ., concurred with STONE, J.

FELLOWS, J. For the reason stated by me in *Tackles* v. *Bryant & Detwiler Co., ante,* 350, I concur in the reversal of the award in this case.

MOORE, J., concurred with FELLOWS, J. KUHN, J., did not sit.

SCHNEIDER *v.* C. H. LITTLE CO.

1. APPEAL AND ERROR—TRIAL—INSTRUCTIONS—REVIEW.
Exceptions to the charge on a theory of defense which might well have been disregarded by the trial court for lack of proof, will not be reviewed by the appellate court.

2. TRIAL—RETRIAL—EVIDENCE—QUESTION FOR JURY—RES JUDICATA.
Where, on a former appeal, the appellate court held that a verdict for defendant had been improperly directed (184 Mich. 315), and, upon a retrial, the case in no essential feature differs from the former one, although defendant advanced a theory of independent, intervening, effective cause, which failed for lack of proof, the court below was not in error in submitting the issues to the jury, under proper instructions.

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3. APPEAL AND ERROR — TRIAL — INSTRUCTIONS — REQUESTS TO CHARGE.

Where the instruction of the court on the defendant's theory of the case was correct so far as it went, the failure of the court to give more specific instructions was not reversible error in the absence of a request therefor.

4. SAME—TRIAL—INSTRUCTIONS.

The charge of the court should be taken as a whole; error cannot be predicated upon isolated portions.

5. EVIDENCE—CONCLUSIONS—EXPERT TESTIMONY.

Conclusions of a witness, even an expert, as to what an ordinarily prudent man would have seen are inadmissible.

6. SAME—FACT—CONCLUSIONS—CONTRIBUTORY NEGLIGENCE.

In an action for personal injuries received by plaintiff by reason of the giving way of a floor on which defendant's agent had negligently piled a great quantity of plaster, testimony of plaintiff that the presence of the plaster on the floor did not cause him any thought of danger was admissible, it being a fact, and not a conclusion, bearing upon the contributory negligence of plaintiff, since, if there was danger which he fully appreciated, he might have been guilty of contributory negligence.

7. TRIAL—MISCARRIAGE OF JUSTICE.

Where there is no reversible error, and, upon the entire record, it cannot be said that the trial resulted in a miscarriage of justice, the judgment of the court below will be affirmed.

Error to Wayne; Gage, J., presiding. Submitted January 22, 1918. (Docket No. 164.) Decided March 27, 1918.

Case by Charles W. Schneider against the C. H. Little Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Stevenson, Carpenter, Butzel & Backus (*Thomas G. Long* and *Rockwell T. Gust*, of counsel), for appellant.

Monaghan, Monaghan, O'Brien & Crowley, for appellee.

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STONE, J. This case has already been before this court and is reported in 184 Mich. 315. On the former trial a verdict was directed for the defendant at the close of plaintiff's case. For the facts before this court upon the former appeal, reference is made to the very full statement contained in that opinion.

On the second trial the defendant introduced testimony regarding the custom prevailing in the city of Detroit among contractors and materialmen, as to the delivery of construction material. Otto Misch, a witness for plaintiff, testified, on cross-examination, as follows:

"*Q.* As I understand you to say, it is customary to put it where the buyer wants it?
"*A.* Yes.
"*Q.* My question is, after the material is placed in the building, if the buyer does not have complete charge of it?
"*A.* He has, yes."

Regarding the relative rights of the architect and contractor, he testified:

"*Q.* In the ordinary course of business a man to whom the material was delivered, or his agent, tells the teamster or driver where to put it, is that right?
"*A.* Yes.
"*Q.* And he customarily directs him to put it in the most convenient place, that is a matter which he decides for himself?
"*A.* Yes.
"*Q.* I mean that is a matter which the buyer decides, is that right?
"*A.* Absolutely, the most convenient for the contractor."

Mr. Wetzel, the architect on the building where the injury was sustained, and a witness for the plaintiff, testified:

"As far as I remember, this was the only time on this job that I told the teamster where to put material."

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On the issue of contributory negligence, the former record was silent as to whether the plaintiff saw the plaster as it was piled in sacks, after delivery. On cross-examination, at the second trial, he testified as follows:

"*Q.* You saw the plaster in there after it was all done, after the man had gone away?
"*A.* Yes."

At the second trial the defendant introduced the testimony of Willard Wunsch, a plasterer in the employ of Mr. Johnke. He testified that he and another plasterer, together with two helpers, were working in the house on all of the day in question, using plaster.

Plaintiff's witnesses, Otto Williams and George DuBois, denied that these employees of Mr. Johnke were working on that day. It further appeared that Gustav Johnke, the plastering contractor, was not present at the building on the day of the accident. Mr. Wunsch testified that Mr. Johnke did not have a foreman on the building on the day of the accident. It is true that Wunsch calls himself the "senior plasterer" in the employ of Mr. Johnke. His testimony was to the effect that he was not on the ground floor of the building when the plaster was delivered; that he was upstairs all day working. He did not know how long it took the defendant's driver to deliver the material, nor did he know the time when it was delivered. The helper was not on the ground floor of the building at the time of the accident; nor was it shown that he was on the ground floor of the building when the material was delivered. No talk was had with the defendant's driver by Wunsch or his helper, if they were there. They were both busily engaged during the entire day doing the plastering work in the upstairs rooms.

The plaintiff's testimony is uncontradicted to the effect that he saw no one there, except his coworkers in the tile setting business, and their helpers.

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Mr. Wetzel, upon the last trial, testified first, that on the day in question the plastering contractor had four men there, and later on he testified that he was not sure of it. He said: "I would not want to swear that they were there on the day of the accident, or whether it was the following day." This is practically all the new testimony on this phase of the case.

The following facts should likewise be added as bearing on the claimed negligence of the plaintiff: He testified that as a tile setter he had not become acquainted with the construction of buildings. He said "I do not know anything at all about the construction of buildings." On the day in question he was working on the porch of this building; his work required him to be in a kneeling position; and he had no warning of anything being defective. He testified that he did not know of any danger in continuing to work on the porch, and the fact that bags of plaster were piled in the bay window, within the building, did not cause him to feel that he was in any danger out there on the porch, where he was working.

Upon the cross-examination of the witness Wetzel, the following occurred:

"*Q.* It would be perfectly obvious to anybody, wouldn't it?

"*A.* Yes.

"*Q.* That would be a dangerous situation, which any ordinary man would undoubtedly see?"

This question was objected to by plaintiff's counsel and the objection sustained, and a motion to strike out the preceding question and answer was granted.

Upon direct examination of the plaintiff, he was asked the following question:

"*Q.* I will ask you whether or not the fact, after putting 100 to 110 bags of plaster in the bay window, would it at the time, or did it at the time, spell to your mind any thought of there being any danger?

"*A.* No, sir."

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This question and answer were objected to, and motion to strike out was made by defendant's counsel, which objection and motion were overruled.

At the conclusion of the proofs, both parties having rested, the defendant moved the court (which motion was denied) to direct a verdict for the defendant for the following reasons:

"*First.* The employees of the plastering contractor who were doing the plastering of the house in question were on the premises, engaged in the work of plastering, all the day on which the plaster was delivered and piled in the manner complained of, and it was their duty to take such care of the plaster delivered as to prevent injury to the others through the plaster remaining in one place for several hours.

"*Second.* The plaster was delivered and piled in the room in which the persons by whom the same was to be used were at work with their mortar box mixing plaster, and under such circumstances it became their duty to so conduct their work and to so care for the plaster delivered to them as to prevent a dangerous condition arising.

"*Third.* The delivery of the plaster in the room in which the persons by whom the same was to be used were at work with their mortar box mixing plaster, was such an acceptance of the plaster and of the delivery thereof by those persons as to impose upon them all responsibility therefor from that time forth, and defendant was wholly relieved of any liability or duty in the premises.

"*Fourth.* The plaintiff was guilty of contributory negligence in continuing to remain, for the length of time which he did, in such close proximity to the alleged dangerous condition created by the servant of the defendant.

"*Fifth.* The plaintiff was guilty of contributory negligence in going upon and working upon that part of the porch in question and adding to the alleged overloading of the floor thereof his own weight and the weight of the tile laid by him and of the wet cement in which the same was laid.

"*Sixth.* If the issue herein were submitted to the

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jury, and the jury should find that the piling of the plaster in the place and in the manner in which it was piled would convey to the mind of an ordinarily prudent person notice that a dangerous condition had been created, then the plaintiff was guilty of contributory negligence in continuing to remain in the immediate presence of such conditions; or, if the jury should not find that the piling of the plaster in the place and in the manner in which it was piled would convey to the mind of an ordinarily prudent person notice that a dangerous condition had been created, then defendant is not liable, as its servant has not been guilty of any negligence."

The defendant also requested the court to charge the jury as follows:

"1. I charge you, gentlemen of the jury, that if you find from the testimony of this case that the employees of the plastering contractor who were doing the plastering of the house in question were on the premises engaged in the work of plastering all the day on which the plaster was delivered and piled in the manner complained of, then I charge you, as a matter of law, that it was their duty to take such care of the plaster delivered as to prevent injury to the plaintiff by reason of the plaster remaining in one place for several hours, and you must find a verdict for the defendant of no cause of action.

"2. I charge you that if you find from the evidence that the plaster was delivered and piled in the room in which the person or persons by whom the same was to be used were working with their mortar box mixing plaster, then I charge you that, under the circumstances, it became their duty to so conduct their work and to so care for the plaster delivered to them as to prevent a dangerous condition arising and you must find a verdict for defendant of no cause of action.

"3. I charge you that if you find that the plaster in question was delivered in the room in which the person or persons by whom the same was to be used, were at work with their mortar box mixing plaster, then I charge you that these facts constitute such an acceptance of the plaster and of the delivery thereof by those persons as to impose upon them, as a matter

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of law, all responsibility therefor from that time forth, and, as a matter of law, defendant was by reason thereof wholly relieved from any liability or duty in the premises and you must find a verdict of no cause of action."

None of the above requests were given.

The trial court submitted the case to the jury in a lengthy charge, in the course of which it used the following language:

("Defendant claims that they are not responsible for this injury, that this plaster—they admit that they sent that to the building to be delivered, but they claim it was not through their fault that this accident occurred, if the man placed it there, nor do they assume that they were responsible.) * * *

"Now, some statement has been made in regard to an action against the principal for the failure of his agent to exercise this degree of care and caution, that is necessary under the circumstances. I say to you that the agent or servant of the person, the fact that he was an agent or servant, makes a person just as responsible as he would be if it was himself. It is his duty to employ people to do the work that is for him to perform in such a manner as not to injure other people by the negligence of his servants, and if they do (if the servants or agents of corporations or persons fail to exercise such a degree of care or caution, as I have stated to you, then, the principal is guilty of negligence. He may not be morally guilty, yet he is in one way, yet it is his duty to employ such people as will avoid injuring other people by their negligence). * * *

"I instruct you if you believe from the evidence in the case that the defendant company through negligence on its part created a situation, causing injury to the plaintiff and was the proximate cause of said injury, and that the plaintiff was free from negligence on his part, then you will return a verdict in favor of the plaintiff.

("I charge you that negligence and carelessness as applied in this case, means the failure to exercise ordinary care, that is, such care as ought to be expected of a reasonable prudent person under similar

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circumstances. I charge you that if from the evidence in the case, you find that under the circumstances the defendant company's servant was guilty of negligence in piling the quantity of plaster in one place without regard to the safety of others working in the same building, and that said negligence was the proximate cause of the injury, you will return a verdict for the plaintiff.)

("Now, as to what is the proximate cause I will instruct you as well as I can. The proximate cause is either the ordinary, common or probable circumstances causing the negligent act of the defendant. Proximate cause is one which is a natural consequence, which is the natural sequence undisturbed by any incident causes this result complained of. To be proximate, the cause must be one without which the accident or injury would not have occurred.) * * *

("I instruct you that if from the evidence in the case you find that the servant of the defendant company was warned by other workmen about the premises that to continue hauling the plaster, such as he was doing, might result in the collapse of portions of the building and injury of those working about the same, and in view of such warning a reasonable and prudent man would not have continued to pile the sacks in one place, the defendant was guilty of negligence.)

("I instruct you that if you find from the evidence in the case, that the defendant company, through its servant delivered the sacks of plaster in a dangerous manner and that as a result of such dangerous delivery, and that such delivery was the proximate cause of the collapse of the walls, and the injury to the plaintiff, the defendant company has been guilty of negligence in law, and that would in no manner excuse and undo the negligence of the defendant, C. H. Little Company.)

("In other words, the fact that somebody else was negligent, if this company was first negligent in regard to this matter, then the proximate cause would be because this company was negligent in placing that material in that bay window.)

("Where delivery is undertaken by the seller, and

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he is advised that the disposition of the goods in a certain way at the place of delivery is dangerous to the structure in which they are placed, and another disposition is safe, his duty to prevent harm is clear, and the obligation would rest upon any person, having knowledge of the unsafe condition created and the probable consequences, to prevent the injury.)

("That is to say, if any of these other employees saw where it was an unsafe condition, and knew the fact that this material was delivered in this unsafe way, then it was their duty also to prevent the injury, but the proximate cause is the action of the man who delivered that plaster in the way in which he was instructed not to, if a reasonably prudent person would not have done so under all the circumstances of the case.)

("The fact that the plastering contractor has received the goods which had been placed at his disposal did not affect or relieve the defendant of the duty to exercise reasonable care, nor excuse his original misfeasance in the absence of evidence that the contractor should undertake to do the plastering, knew about the condition which was created or had reasonable grounds for apprehension would be created.")

The jury returned a verdict for plaintiff in the sum of $8,500 damages, and judgment was entered thereon. The defendant brings the case here upon writ of error, and error is assigned upon the refusal of the court to give defendant's requests to charge above set forth, and each of them; in refusing to direct a verdict for the defendant upon the several grounds specified in defendant's motion therefor, in those parts of the charge in parentheses above quoted, and in the rulings with reference to the reception of evidence in the instances above set forth.

On the former appeal this court held that a verdict had been improperly directed by the trial court.

Counsel for appellant, in their brief, discuss the matter of independent, intervening, effective cause. They do not seriously contend that the appellant was

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free from negligence. The contention seems to be that, although the appellant was originally guilty of negligence in piling the material in such a manner as to cause the floor to fall, there intervened a subsequent agency which was likewise negligent, and that the intervention of this agency excused the appellant.

Upon a careful reading of the opinion and the record upon the appeal, as well as the record upon the second trial—now before us—we are of opinion that in no essential way is the case to be distinguished from the one presented in the previous record. In our opinion the essential features of it are the same. The only witness introduced by the defendant was Willard Wunsch. His testimony showed that he was at the building at the time of the accident; that he was an employee of Johnke, the plastering contractor; that he had a laborer assisting him, and that there was no foreman for Johnke on the job. The duties of this witness were those of a plasterer; he was, during the entire day, working on the second floor of the building. There is no claim that he signed a receipt for the material delivered, or saw it; and it does not appear that he even had charge of the work. He did not speak to the driver who delivered the material, nor did he claim to have, or exercise, any control over it during the day. It appears distinctly that the only persons with whom the driver had any conversation on that day were the plaintiff and Wetzel, the architect. That conversation appears in the original statement of the case.

When the case was before this court upon the former appeal, Mr. Justice OSTRANDER, in the opinion, said, on page 321:

"The facts support the conclusion that for some five or six hours before the porch collapsed the plaster was completely and unconditionally at the disposal of Johnke, the buyer."

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And on page 325:

"It does not appear that contractor Johnke knew anything about the condition which was created, or had reason to apprehend that it would be created. Appellee has not made out a case within the governing principle it relies upon. Whether plaintiff was himself negligent is a question not determined by the trial court."

It is conceded that Johnke was not at the building when the material arrived, nor was he present at the building between that time and the time of the accident; nor was there a superintendent or foreman of Johnke's in charge. The only person present (if we are to accept Wunsch's testimony) was a plasterer and his laborer. The plasterer was at work on the second story of the building; his helper was mixing plaster. There is no claim that the driver who delivered the material spoke to the plasterer or informed him where he was placing the material.

Giving the strongest probative force to the testimony of the witness Wunsch, the case in no essential differs from the one upon the previous appeal. Neither Johnke nor any one with authority from him "knew of the condition which was created, or had reason to apprehend that it would be created."

Upon the subject of contributory negligence, which was urged by appellant in its motion to direct a verdict, we do not think the court erred in submitting that question to the jury. There is no criticism of the charge of the court upon the subject of contributory negligence, if that were a proper question to submit to the jury.

It is claimed that certain knowledge of the plaintiff was shown upon the second trial which did not appear upon the first trial. There is no doubt that the presence of the plaster in the sacks or bags was obvious, but it does not follow that the plaintiff was

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guilty, as matter of law, of contributory negligence. The evidence is very clear that the plaintiff had no knowledge with reference to the strength of the structure, he having distinctly testified—that testimony being uncontradicted—as follows:

"I had no knowledge of the construction of that porch, and no knowledge of the construction in general of buildings."

He was working out upon the porch. In our opinion the questions, both of the negligence of the defendant and the negligence of the plaintiff, were questions of fact for the jury, and the court did not err in so treating them.

There are many assignments of error and much criticism of counsel, upon the charge of the court. It having appeared, as we have already indicated, that the contractor, Johnke, knew nothing about the condition which was created, and had no reason to apprehend that it would be created, and that he had no agent or person authorized to act for him in receiving the material or directing its disposition, we think there was no error in the refusal of the court to give defendant's requests to charge. If, as we think, the defendant, upon the last trial, did not bring itself within the rule which it invoked, then there was no independent, intervening, effective cause, and what the court said to the jury in that portion of the charge which is excepted to with reference to proximate cause, might well have been omitted by the court. The theory failed and might well have been disregarded in the charge. In other words, the elimination of Johnke as an active, intervening cause of the accident (aside from the negligence of the plaintiff) left but one question, *i. e.*, the negligence of defendant. This court has often held that a theory, unsupported by proof, is not a proper matter for a jury's consideration. *Lee* v. *Longwell*, 136 Mich. 458; *Woods* v.

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Palmer, 151 Mich. 30; *Charette* v. *Village of L'Anse*, 154 Mich. 304; *Saros* v. *Avenue Theatre Co.*, 172 Mich. 243.

As was said in *Lewis* v. *Brick Co.*, 164 Mich. 489, 501: "Affirmance of the judgment does not imply approval * * * of all that was said to the jury."

It is also complained that the court did not state the defendant's theory of the case; and that it failed to give a sufficiently comprehensive statement of its claim; but no request was made for more specific instructions upon this point. The instruction seems to have been correct so far as it went, and this court has frequently held, that the failure to give more specific instructions is not erroneous, in the absence of a request therefor. *Hammond* v. *Porter*, 150 Mich. 328; *Spray* v. *Ayotte*, 161 Mich. 593; *Lewis* v. *Brick Co.*, *supra*; *Totten* v. *Totten*, 172 Mich. 565; *Hartwig* v. *Kell*, 199 Mich. 603, 611.

The charge is criticised where the court said: "He might not be morally guilty, yet he is in one way," etc., above quoted. The comment of the court here given was at the conclusion of the statement, that an employer was responsible for the acts of his servant. Taken in connection with the language with which it was used, we do not think there was reversible error. The instruction of the court should be considered as a whole, and not by isolated portions. This doctrine has frequently been referred to, and it is hardly necessary to cite cases.

Certain rulings of the court upon the introduction of testimony are presented by the assignments of error, which questions appear herein. We do not think it was error for the court to decline to permit the architect to answer the question: "That would be a dangerous situation which any ordinarily prudent man would undoubtedly see?" The question clearly called for a conclusion. While it is claimed that the witness

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was an expert, it can hardly be said that he was an expert on what an ordinarily prudent man would have seen. That was a question for the jury.

The court also refused to strike from the testimony the answer of the plaintiff, that the presence of the plaster did not cause him any thought of danger. This was a fact and not a conclusion. It was a step bearing upon the question of the contributory negligence of the plaintiff, for if there was danger which he fully appreciated, he might have been guilty of contributory negligence. It was therefore a fact which it was competent for him to testify to, which, it is true, might not have been controlling of the whole question; but the jury were instructed to consider what an ordinarily prudent man would have done under the whole circumstances.

Viewing the entire case upon this record, we are of opinion that it cannot be said that the trial resulted in a miscarriage of justice, and we find no reversible error in the record, and the judgment of the lower court is therefore affirmed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

CUTTER *v.* POWERS.

1. PRINCIPAL AND AGENT—EVIDENCE—SPECIAL QUESTION—FINDING OF JURY.

   In an action for money alleged to have been paid to defendant by plaintiff's decedent to be applied to the payment of a specific debt, evidence *held*, to sustain the finding of the jury, in answer to a special question, that

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defendant was not acting as agent of a third party in receiving the money.

2. SAME—SPECIAL AGENT.

When defendant accepted the money with instructions to pay a specific debt, he was acting as the agent of plaintiff's decedent.

3. SAME—AGENT OF BOTH PARTIES

It is permissible for the agent of one party to be appointed by the adverse party as his agent for certain purposes, and each party will then stand in the relation of principal to the agent as to the matters entrusted to the agent, and as to those alone.

4. SAME—SPECIAL AGENT—LIABILITY OF AGENT.

Where a principal places money in the hands of an agent to pay a debt when ordered, and the agent refuses to obey such orders, he becomes liable to the principal, whether the instructions are violated through mistake or design.

5. WITNESSES — MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED—OPPOSITE PARTY.

Although the third party, for whom defendant claimed to be acting as agent, was not a party to the record, he had a pecuniary interest in the subject-matter of the litigation, and was an opposite party within the statute barring his testimony as to transactions with plaintiff's decedent.

6. EVIDENCE—HEARSAY—RELEVANCY—ADMISSIBILITY.

The third party not being present when the money in question was paid to defendant, and what occurred then and there being the crucial and vital question in the case, the court might have excluded his testimony as irrelevant and immaterial.

7. DAMAGES—DUTY TO MINIMIZE.

Where there was no question that decedent owed the debt for the payment of which the money was paid to defendant, when decedent ascertained that the debt had not been paid, it was his duty, instead of entering into litigation to avoid its payment, to pay it, and thus make his damages as small as practicable, and the judgment in his favor should have been limited to the amount paid, with interest.

Error to Kent; Perkins, J. Submitted January 30, 1918. (Docket No. 178.) Decided March 27, 1918.

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Assumpsit by Linnie Cutter against Frank J. Powers for money had and received. Judgment for plaintiff. Defendant brings error. Affirmed conditionally.

P. H. Walsh (*Frank J. Powers*, of counsel), for appellant.

Grant Sims, for appellee.

STONE, J. This suit originated in justice's court. The declaration was in assumpsit and consisted of a single special count stating the claim of the plaintiff, in substance, as follows:

That whereas, in the month of July, 1914, Charles Cutter was indebted to the Holland Furnace Company, a corporation, in the sum of $145 for the price and value of a furnace sold and delivered by said company to said Charles Cutter, and for certain work and labor performed by it in installing the furnace in the said Cutter's house; and the said Cutter desiring and intending to pay to the said company the said sum of money, did, in the said month of July, deliver over to the custody and possession of the defendant and intrusted him with the sum of $145 for the sole purpose of, and with instructions to said defendant, to immediately pay over and deliver said money to the said furnace company in payment of the said debt, and for no other purpose; which moneys and funds said defendant then and there so had and received, and agreed to pay over and deliver the same accordingly to said company in payment and satisfaction of said debt; and that he took upon himself the execution of said trust. But notwithstanding said agreement upon the part of said defendant, he has since then committed the following breach of said trust, that is to say, he afterwards, and in violation of said trust which he had so assumed and agreed to execute and perform, did neglect and refuse to pay and deliver said sum of money

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and funds, or any part thereof, to said company in payment of said debt; and, upon demand, also refused to deliver the said money and funds, or any part thereof, to this plaintiff. That the said company thereafter sued said Charles Cutter in the circuit court for the sum of $145 and interest to recover the debt aforesaid which was the sum that the said defendant was to deliver in money and funds to said company in payment thereof; that said Charles Cutter died testate on or about December 18, 1914, while said suit was pending, and his estate was duly probated in the probate court for the county of Kent; that after the death of said Charles Cutter said action was revived and continued against the said Charles Cutter's estate; and the executrix of the said will, under the advice of her counsel, appeared in and defended the said action; that after a trial in the circuit court aforesaid, judgment was rendered against the estate for the said $145 and costs and interest, amounting in all to $207 or thereabouts, which judgment, including the costs and interest, the said estate has paid to the furnace company. That the plaintiff was the heir at law and sole legatee of said Charles Cutter, now deceased, and entitled to all the assets of said estate; that by an order of said probate court in the due administration of said estate, the residue thereof was duly assigned to the plaintiff, among other assets being the said claim for the said moneys so had and received by said defendant, as herein alleged; and also for the claim of said estate for the costs and interest sustained by it in defending said claim of the said company, which damages, costs and interest were suffered and occasioned by negligence, breach and default of the said defendant in the execution of the trust as aforesaid; that plaintiff now owns said claim, is entitled to receive the same from the said defendant, and any and all damages in the

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premises accruing by reason of said breach of said trust.

Plaintiff by said declaration demanded judgment for compensation and damages for said breach of trust covering said sum of $145, with interest and costs of said litigation. The plea was the general issue.

Upon the trial of the case in the circuit court (to which the plaintiff had appealed from an adverse judgment in justice's court), it appeared that on or about May 1, 1914, Cutter sold to one Egan his interest in a land contract in a certain hotel property at Berlin, Michigan; that the title to this hotel property was owned in fee by one Greiner. In making said sale and transfer Charles G. Turner acted as the attorney for said Cutter, and the defendant acted as attorney for Egan.

There were certain debts owing by said Cutter, supposed to be about $700. It was claimed that it was represented by said Cutter to Egan that all payments on the land contract, which was assigned by Cutter to Egan, of interest and instalments of principal had been paid up to May 1, 1914. The defendant further claimed that about the middle of May, 1914, Greiner informed Egan that the April payment on the land contract amounting to $85.83 and the last six months' interest on said contract, amounting to $75, making in all $160.83 up to May 1, 1914, had not been paid by Cutter. It also appeared that there was an outstanding note and indebtedness of about $145 due the Holland Furnace Company from Cutter, and there was evidence that this fact was brought to the attention of the defendant; that the defendant, in the interest of his client, Egan, approached Mr. Turner, the attorney for Mr. Cutter, and called his attention to said furnace company's claim, which was represented by a note retaining title in the furnace. It, in substance, was testified to by Mr. Turner that he called Cutter's attention

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to this furnace debt, and that one day soon thereafter, Cutter brought to him $145 to pay said furnace company's indebtedness; that he, Turner, handed this money, consisting in part of a check and in part in currency, over to the defendant, and said to him:

"Mr. Powers here is the money for that furnace, that Holland furnace, and you take it and settle the matter up. * * * I told him here is the money to pay the Holland Furnace Company for the furnace that Mr. Cutter had not completed payments on. You take it and pay the Holland Furnace Company";

and that defendant took the money.

Some time after this it came to the attention of Mr. Turner that the Holland Furnace Company claim had not been settled. Whereupon, according to Mr. Turner's testimony, he had a conversation with the defendant and said: "What about that money that I paid you for the Holland Furnace Company, that $145.00;" that the defendant avoided the matter and claimed to be very busy, but that in another conversation, the same day, the defendant finally admitted that he had received the money. The testimony of Mr. Turner was corroborated by that of a young lady, a stenographer in his office, who testified that she was present and heard the conversation, and saw the money paid over to defendant.

The claim of the furnace company not having been paid, it instituted a suit against Mr. Cutter for the amount due it upon the furnace. Pending that suit Mr. Cutter died. It was revived in the name of his executrix and finally went to judgment. The amount of the judgment was $158.45, and costs taxed at $61.15. The claim was finally satisfied by the plaintiff paying the sum of $210.90 in full settlement of the judgment.

It was the claim of the plaintiff upon the trial of the instant case that Mr. Cutter, acting through Mr. Turner as his attorney, made the defendant his agent for

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the payment of the $145 to the Holland Furnace Company. The defendant testified that the money which he received was for another and entirely different purpose; that nothing was said to him about the furnace indebtedness, but that when it came to his attention from Mr. Egan that the interest and installment of principal had not been paid by Cutter to Greiner covering all amounts due up to May 1, 1914, the following occurred:

"The next time that I had any relation to this matter was some time in the first part of June. I had heard from Egan some time in June about the contract, and a short time after I heard from Egan, and I think in the month of June, Miss Mellema, Turner's stenographer, came to my office and paid the $145 in the form of a certificate of deposit. She said to me: 'Here is this $145 to pay Egan on what Cutter owed Egan for the April payment, and the last six months' interest on the contract.' She asked me if I knew about it. I told her I knew about it as Egan called me up about it. She laughed. I said to her I thought Cutter had paid everything up to the first of May. She said evidently he did not. I said yes, evidently he did not. And she gave me the $145 certificate of deposit and said also that Egan and Cutter had made a deal, and she told me that Cutter owed $160.83 to Egan, that this $145 and the buggy, which Egan accepted, paid up Cutter's debt. I turned the $145 certificate of deposit over to Egan and did not charge either one anything for it."

He testified that subsequently, and before any demand was made on him by the plaintiff, he paid the money over to Egan as his attorney. It will thus be seen that there was here a sharp conflict in the testimony as between Turner and the stenographer upon one side, and the defendant upon the other.

In the course of the trial the court ruled that the testimony of Mr. Egan of matters equally within the knowledge of Mr. Cutter could not be received under the statute. All of the offers of testimony of Egan

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were upon collateral matters, and all of but little probative force. Error is assigned upon refusal of the court to receive this testimony.

At the close of the testimony the defendant moved for a directed verdict in his favor, for the following reasons:

(1) The testimony shows that the plaintiff paid the money to the defendant as agent for a third person, and the proofs show that defendant has paid the money over to said third person.

(2) For the reason that the plaintiff's claims, and her testimony shown that the money was paid to the defendant as an agent, and paid to the agent for a specific purpose; and the proofs show that the defendant transferred the money to said third person, his principal.

This motion was denied by the court and exception duly taken.

There were requests to charge covering the same ground; and also that, as matter of law, the jury ought to disregard the taxed bill of costs of $61.15 in determining the measure of damages.

In the course of its charge to the jury the trial court used the following language:

"There is but one question in this case, and only one for your consideration, and that is, the question of fact which you are to determine under the evidence. That question is whether the claims of the plaintiff as to the purpose for which this money was turned over to Mr. Powers are true, or whether the claim of the defendant, Mr. Powers, is true, that it was turned over to him for his client, Mr. Egan. That the money was turned over is unquestioned; it is an undisputed fact in this case; that the transaction between Mr. Cutter and Mr. Egan took place and was completed, is undisputed in this case. That the land contract was assigned to Mr. Egan, and that upon the back of the contract was indorsed the various payments showing the amount due at the time the assignment was made, are all undisputed facts in the case. Narrowed down

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to its ultimate limits, the case resolves itself into a question of whether Mr. Turner and his stenographer are telling the truth, or whether Mr. Powers is telling the truth.

"(The fact that the defendant Powers was the agent and attorney for Mr. Egan in the transaction between Mr. Egan and Mr. Cutter will not prevent him from also becoming the agent of the adverse party, Mr. Cutter. In other words, he may, under proper circumstances, act as the agent for both parties. The question, as I have said, is one of fact, whether or not the defendant accepted this money, this $145, with the express understanding and agreement, as the plaintiff claims, that it was to be used exclusively by the defendant for the payment of the Holland Furnace Company's claim.

"As a matter of law, and I so instruct you, the agent of one party to the transaction may be appointed by the adverse party as his agent also, for certain purposes, and each party will stand in the relation of principal and agent as to the matters thus intrusted to such agent, and to those alone. Such appointment of the agent of the adverse party must be established by a preponderance of the evidence. What was said and done by the parties and the circumstances of the case as disclosed by the evidence should be taken into consideration by the jury)."

The following special question was submitted to the jury at the request of the defendant: "Did the plaintiff or her representatives pay the money to the defendant as Egan's agent?" To which the jury answered: "No."

The jury returned a verdict for $231.20 damages, and judgment was entered accordingly. There was a motion for a new trial based upon many reasons, among others: Because the court erred in its charge to the jury upon the measure of damages. This motion was denied by the court and exception duly taken. The defendant has brought the case here for review. The assignments of error raise many questions, among others: That the court erred in refusing to grant de-

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fendant's motion for a new trial on each of the grounds therein stated; that it erred in that part of the charge embraced in parentheses.

The propositions relied upon by him, and on which error is assigned, are as follows:

(1) Was the defendant acting as agent of Egan when he received the money?

(2) If he was acting as such agent when he received the money, and paid the money over to his principal, can an action be maintained against the defendant?

(3) Errors of the court in allowing certain answers to stand, and in instructing the jury that certain facts were true when said facts were in dispute.

(4) Did the court err in not allowing Egan to testify as to transactions between himself and the plaintiff's decedent?

(5) Was the verdict against the weight of the evidence?

As stated by the trial court to the jury, and as demonstrated by an examination of the record, the case presented a single material issue, and that was: Under what circumstances, and under what instructions, if any, was the money paid to the defendant by Mr. Turner, or his stenographer, as the case may be? It was clearly testified to by Mr. Turner and his stenographer, that the money was turned over to defendant for the express purpose of applying it upon the indebtedness to the furnace company, and thus relieving the property from any question of lien upon it by reason of that indebtedness. The defendant testified that the money so paid over by the stenographer was for an entirely different purpose. Somebody is woefully mistaken, or has sworn untruthfully in the case. That question was submitted to the jury squarely. In the course of the trial the testimony that was introduced went far afield, and brought in collateral matters in great detail of the deal between Cutter and Egan in the sale of the contract of the hotel property.

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The first and second points urged by defendant may be disposed of together. An examination of this record shows that there was evidence to sustain the answer of the jury to the special question submitted by the defendant. That being so, the question seems to be settled whether the defendant was acting as the agent of Egan when he received the money. That the defendant had been acting generally as the attorney for Egan, cannot be questioned. There ought to be no dispute about the law upon this subject. If the plaintiff's position is true, and that question seems to have been settled by the verdict of the jury, the defendant, when he accepted this money with instructions to pay it over to the furnace company, was acting as the agent of Mr. Cutter. It is permissible, and often the agent of one party to a transaction, is appointed by the adverse party as his agent for certain purposes, and each party will then stand in the relation of principal to the agent as to the matters by him entrusted to the agent, and as to those alone. 2 C. J. p. 448. This rule has been frequently asserted by this court.

In *Adams Mining Co.* v. *Senter*, 26 Mich. 73, 77, Justice CAMPBELL, speaking for the court, said:

"The question next arises, how far the double agency of Captain Frue affected his relations to his employers and to third persons. * * * The authority of agents may, where no law is violated, be as large as their employers choose to make it. There are multitudes of cases where the same person acts under power from different principals in their mutual transactions."

See, also, *Colwell* v. *Iron Co.*, 36 Mich. 51; *Michigan Slate Co.* v. *Railroad Co.*, 101 Mich. 14, 28, and cases there cited.

The doctrine is also well settled that where a principal places money in the hands of an agent to pay a

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debt when ordered, if the agent refuses to obey such orders he becomes liable to the principal, and this is true whether the instructions are violated through mistake or design. We think there was ample testimony to warrant the charge, upon that branch of the case.

We have examined the alleged errors of the court in allowing certain answers to stand, and the instruction to the jury complained of, and think they are without merit. The rulings, and instruction present no question of reversible error.

Coming to the fourth question argued: Did the court err in not allowing Egan to testify to transactions between himself and plaintiff's decedent? We find no error of the court in this ruling. It is true that Egan was not a party to the record. It was the claim of the defendant, and the case was tried by him upon the theory, that he was the agent of Egan. It is well settled in this State that the opposite party does not necessarily mean a party to the record; but it means any person whose interests are, as matter of fact, antagonistic to the interests of those for whose benefit the statute was passed. Egan had as direct a pecuniary interest in the subject-matter of the litigation as though he had been a party to the record. He had a direct pecuniary interest in the result of the case. *O'Neil* v. *Greenwood,* 106 Mich. 572, and cases there cited; *Laird* v. *Laird,* 115 Mich. 352; *Chaddock* v. *Chaddock,* 134 Mich. 48; *Ayres* v. *Short,* 142 Mich. 501; *Abbott* v. *Jones,* 164 Mich. 598.

There is another reason why we think the ruling of the court would not in any event have been prejudicial error. There was no claim upon the trial that Egan was present when the money in question was paid to the defendant. What occurred then and there, was the crucial and vital question in the case. All of the matters sought to be introduced by the witness Egan were collateral matters, and the court might well have

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ruled them out as being irrevelant and immaterial. We are satisfied that the verdict was not against the weight of the evidence.

We think the verdict was too large, and that the measure of damages adopted by the court in its charge was erroneous. The evidence as to costs was objected to by defendant. There never appeared to be any question that Mr. Cutter owed the Holland Furnace Company for the furnace. It was his debt. It is the claim of the plaintiff, representing her deceased husband, that the defendant, as the agent of her husband, did not obey the instructions, and pay the money in question to the Holland Furnace Company. There seems to have been no question as to the merits of the claim of the furnace company. When Mr. Cutter ascertained that the money which he had given to his agent, the defendant, to be paid to the furnace company had not been so applied, it was his duty then to have paid the furnace company the amount due it, and thus have made his damages as small as practicable. Instead of that he entered into a litigation with the Holland Furnace Company, resulting in a bill of costs which the plaintiff paid. In other words, the amount of money which the defendant owes the plaintiff upon any theory of the case, cannot exceed the sum of $145 with interest thereon at five per cent. per annum from July, 1914, to May 15, 1917, the date of the judgment. That amount, which we compute to be $165.54, should have been the extent of the plaintiff's damages, and the costs in the furnace company case should have been eliminated. We find no other error in the record. If the plaintiff shall, within 30 days after the filing of this opinion, remit that portion of this judgment for damages in excess of $165.54, the judgment as thus modified will stand affirmed, but without costs to the plaintiff in this court. If such

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excess is not remitted within the time above specified, the judgment will be reversed and a new trial granted, with costs to the appellant.

BIRD, MOORE, STEERE, FELLOWS, and BROOKE, JJ., concurred. OSTRANDER, C. J., and KUHN, J., did not sit.

MILLER *v.* DETROIT UNITED RAILWAY.

1. STREET RAILWAYS—CROSSING ACCIDENT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—DIRECTED VERDICT.

In an action against a street car company for personal injuries and also for injuries to plaintiff's automobile, caused by a collision with defendant's street car, where plaintiff's testimony was contradictory, and the uncontradicted testimony of defendant's witnesses showed that plaintiff was guilty of contributory negligence as a matter of law, the court below was in error in refusing defendant's motion for a directed verdict in its favor.

2. NEW TRIAL—EVIDENCE—GREAT WEIGHT OF EVIDENCE.

Where the verdict was contrary to the great weight of the evidence, the court below should have granted defendant's motion for a new trial.

Error to Wayne; Mandell, J. Submitted January 23, 1918. (Docket No. 170.) Decided March 27, 1918.

Case by George W. Miller against the Detroit United Railway for injuries to himself and his automobile. Judgment for plaintiff. Defendant brings error. Reversed, and no new trial ordered.

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Corliss, Leete & Moody (*Thomas T. Leete, Jr.*, of counsel), for appellant.

Baubie & Baubie, for appellee.

STONE, J. Plaintiff recovered a judgment for $530.15 damages for alleged personal injuries, and also for damages to his Wood electric automobile, received in a collision with one of the street cars of the defendant on October 16, 1915. The negligence complained of was excessive speed, want of control of car, and absence of signals. The plaintiff had lived in Detroit for 17 years, had owned 7 electric cars, had been accustomed to driving them, and was well acquainted with the streets of the city, and had been in the habit of crossing railway intersections.

He was driving his automobile north on McDougall avenue about 5:30 p. m. and approached Waterloo street, upon which defendant operates its street cars, all of which travel in an easterly direction.

The testimony of the plaintiff, in many material particulars, was contradictory and irreconcilable as found in this record, as will appear by the following excerpts taken therefrom:

"On the 16th day of October, about 5:30, I was driving up McDougall avenue, and as we came near the railroad track on Waterloo street, I went slower and put on the brakes, and when the car was within, say 40 feet, I looked up the track, and I saw nothing coming in the way of a street car.

"*Q.* How far could you see up the track?

"*A.* About 125 feet.

"*Q.* Did you hear any noise at that time of the approaching car?

"*A.* No, I heard no noise or bell.

"*Q.* What did you do then?

"*A.* I, of course, cut down my speed.

"*Q.* How fast were you going?

"*A.* Not more than ten or eleven or twelve miles.

"*Q.* At the time you first looked?

"*A.* Yes, sir.

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"*Q.* What was your rate of speed after that?

"*A.* I cut my car down probably to seven or eight miles as I approached the track.

"*Q.* What did you have, or what did you do in order to do that?

"*A.* I put my foot on the brake.

"*Q.* Then what happened; you went along at the same rate of speed?

"*A.* I looked up and saw.

"*Q.* How far were you from the tracks when you looked the second time?

"*A.* I should say I was about 18 or 20 feet; I could not give the exact distance.

"*Q.* Did you notice the car?

"*A.* I saw a street car coming then very rapidly.

"*Q.* What did you notice about the car?

"*A.* I noticed it was coming very fast and jumped up and down pretty lively, and I saw something had to be done quick.

"*Q.* Could you have stopped your car?

"*A.* I could not stop it without getting killed.

"*Q.* Although going seven or eight miles an hour * * * what did you do?

"*A.* I saw there was only one thing to do, turn to the right and go over the street car (track?) or be crushed.

"*Q.* What was immediately to your right?

"*A.* A telegraph pole, very large telegraph pole, * * * I had to avoid that.

"*Q.* Could you tell the court and jury what the distance was between the curb there, and the railroad track at your right?

"*A.* Ten feet from the curb to the first track—to the first rail. The telegraph pole was right on the corner. I turned with the car, the only thing that any man on earth could do to save himself, and he struck me, as near as I can explain, a sort of quartering near the hinges, and the car was hit and I was struck on my head with glass."

Plaintiff then testified that it was necessary to have the machine repaired at an expense of five or six hundred dollars. The bill for repairs was received in evidence, and defendant admitted it was a reasonable charge.

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The injury to plaintiff's person was inconsiderable. On cross-examination the plaintiff testified:

"That electric car has four forward speeds. * * *

"*Q.* After you had looked the last time, and while approaching the street car track previous to turning, at what speed were you running?

"*A.* When I started to turn the car, or before I turned it probably not faster than seven miles an hour. * * *

"*Q.* So in what distance, under the conditions as they were at that time, to your best judgment, would you have been able to have stopped the car running at a speed of 7 or 8 miles per hour?

"*A.* Well, it is impossible for me to answer the question only in this way: I use both brakes; I might possibly have been able to stop the car going at that speed in 10 feet or 8 feet.

"*Q.* Eight feet or ten feet using both brakes?

"*A.* I don't know exactly; I don't know as I could."

He was then asked if he could have stopped it within 10 feet or 12 feet or 16 feet or 18 feet, and he answered he could not tell.

Cross-examination continuing:

"*Q.* The front of your car was from 18 to 20 feet from the street car track when you saw the car the last time?

"*A.* When I saw the car the first time; I never saw it but once.

"*Q.* You saw it only once?

"*A.* I looked up and saw it when I was *forty* feet away.

"*Q.* In the neighborhood of *forty* feet?

"*A.* Yes, sir.

"*Q.* When you approached the track when away a distance of 18 or 20 feet away from the car track, you looked again and saw the car approaching again at that time?

"*A.* Yes, sir. I noticed that the car was approaching very rapidly. I could not give the exact distance it was away when I first saw it; it would be impossible for me to tell you."

On re-direct examination plaintiff further testified:

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"When I got within 18 or 20 feet from the track, I saw this car to my left. It is almost impossible for me to tell positively, whether or not, at the speed I was going, seven or eight miles an hour, I could stop that car in a distance of 18 or 20 feet, when I first saw the car before reaching the track."

Edward Voss and Edward Whitstock, two witnesses produced by the plaintiff, were driving another automobile, coming south on McDougall avenue at the time of this accident. They saw the street car coming, and stopped their car on the north side of Waterloo street, to allow the street car to pass. Voss testified, on cross-examination, that he was accustomed to operating electric automobiles:

"I have been at the Anderson electric; that is about the same thing. Four speeds. The same as Woods. I could not tell how weight compares. In size they are about alike, about the same thing. Both have batteries the same.

"*Q.* In that electric car, an electric car running at the speed of seven or eight miles an hour, on a good pavement, asphalt pavement or brick pavement, in what distance could it be stopped?

"*A.* By using all the appliances at seven or eight miles an hour you could stop it in six feet."

Whitstock testified:

"From where I stood, I thought Mr. Miller wanted to cross the track, but when he saw the street car, he wanted to avoid it, and turned around. At the time he turned he was getting on the track. The street car was then about 100 feet from him. I heard no gong or bell. * * * That day that [street] car was driving at the rate of between 20 and 25 miles an hour. When I first saw the car, when the car was 100 feet off, I did not notice any checking of the rate of speed of the car. I noticed the car when it came upon Miller. When Miller's car was struck it was knocked about 40 or 45 feet from where he started to cross the track, down Waterloo street."

Upon the defense, the conductor and motorman oper-

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ating the street car, and three disinterested eyewitnesses, all of whom were on the street car, gave testimony tending to show that the street car was being operated at about 12 miles per hour with the power shut off, as it approached the intersection of McDougall avenue; that the automobile came up the street at the speed of at least 20 miles per hour, and did not change its speed, but ran directly in front of the street car; and that when the street car was near the west line of McDougall avenue, the automobile was 75 feet south of the street railway track. Several of these witnesses testified to the ringing of the gong by the motorman from the time it was 100 feet away from the corner and his prompt action in attempting to stop the car. Other of defendant's witnesses on the street car testified that they saw the automobile plainly when it was 30 feet away from Waterloo street. The crossing was considered a dangerous one, because of a building which stood near the southwest corner of the intersection. There was a conflict in the evidence as to the distance the street car ran before stopping after the collision, varying in distance from 5 to 40 feet.

Defendant requested the court to charge the jury that the plaintiff was guilty of contributory negligence and could not recover. This was refused, and the questions of the negligence of the defendant, and the contributory negligence of the plaintiff were submitted to the jury.

There was a motion for a new trial based upon several grounds, among which was this, that the verdict was contrary to the weight of the evidence. This motion was denied and exceptions were duly entered.

In this court the defendant, under proper assignments of error, claimed that a verdict should have been directed in its favor, under the testimony, on the ground of contributory negligence of the plaintiff; that no negligence on the part of the defendant was shown;

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and that the verdict of the jury was, in any event, contrary to the weight of evidence.

In our opinion the uncontradicted testimony shows that the plaintiff was guilty of contributory negligence as matter of law. His own testimony was so contradictory, and irreconcilable, that it furnishes but little aid in disposing of the case. While in his declaration he claimed that when he slackened the speed of his automobile at a distance of about 25 feet from the track, he looked and saw a car coming at a "terrific speed"; at the trial he testified first, that when he was 40 feet from the track he saw no street car coming, that he then proceeded until he was about 18 or 20 feet from the track, and at that point saw the car coming rapidly. On cross-examination he distinctly testified that "I looked up and saw it when I was 40 feet away." After testifying that he could probably have stopped the automobile in "10 feet or 8 feet," he then gets into "doubting castle," and does not know as he could have stopped it in 18 feet.

We are satisfied from the evidence that the car could have been stopped in from 6 to 10 feet, in the exercise of reasonable care. He testified that the car was in perfect condition, and he was accustomed to running it. The following cases, with others, are cited by appellant upon this branch of the case: *Colborne* v. *Railway*, 177 Mich. 139, 150, and cases cited; *Borschall* v. *Railway*, 115 Mich. 473. As was said in the last cited case:

"If he saw the car coming, and then attempted to cross the track, he took his chances of being injured and cannot complain."

We are also of the opinion that the verdict was contrary to the great weight of the evidence.

For these reasons the judgment of the circuit court is reversed, with costs to the appellant, and no new trial will be granted.

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OSTRANDER, C. J., and STEERE, BROOKE, and FELLOWS, JJ., concurred with STONE, J.

MOORE, J. I concur because the verdict is against the weight of the evidence.

BIRD, J., concurred with MOORE, J. KUHN, J., did not sit.

ENGEL *v.* SMITH.

PROCESS—SERVICE—JOINT DEFENDANTS—NONRESIDENTS — PROOF OF SERVICE—JURISDICTION.

Where suit was commenced in plaintiff's home county against joint defendants residing in another county, and service of process was had on one of the defendants in plaintiff's home county, but no proof of service of the writ on the home defendant was made and filed with the county clerk before service was had upon the other defendants in another county, the practice was not in conformity with chapter 13, § 27, subd. 4, of the judicature act (3 Comp. Laws 1915, § 12430) and Circuit Court Rule No. 18, § 1, and therefore the court did not obtain jurisdiction, and any judgment rendered therein was void.

Case-made from Kent; Barton, J., presiding. Submitted January 15, 1918. (Docket No. 74.) Decided March 27, 1918.

Replevin by Gust Engel and another against William L. Smith for the possession of an automobile. Judgment for plaintiff. Defendant appeals. Affirmed.

E. J. Bowman, for appellant.

Smedley & Linsey, for appellee.

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STONE, J. This is an action of replevin commenced in the Kent circuit to recover possession of one Saxon six-cylinder automobile which had been levied upon by the defendant, a deputy sheriff, of Kent county, by virtue of an execution issued out of the circuit court for the county of Montcalm upon a judgment in an action of assumpsit wherein William H. Browne was plaintiff, and the Haynes Company of Grand Rapids, formerly Grand Rapids Saxon Company, Gust Engel, Aaron L. Mann and Junietta Mann were defendants.

The facts are not in dispute. The case is here upon a case-made after judgment for the plaintiffs, and the questions involved relate to the jurisdiction of the circuit court for the county of Montcalm to enter the judgment in the action of assumpsit.

Upon the trial of the instant case the plaintiffs introduced evidence tending to show that the automobile, which was the subject of replevin, was their joint property.

Defendant introduced evidence tending to show that he was a deputy sheriff of the county of Kent and that he came into possession of said automobile by virtue of a levy of execution issued out of the circuit court for the county of Montcalm in said assumpsit suit. The files in the Montcalm county circuit court case, consisting of the original summons, with certificate of service indorsed thereon, declaration in assumpsit, affidavit of nonappearance of all defendants, default, and judgment against all four defendants therein, for the sum of $496.50 were introduced in evidence. The summons was the ordinary law summons for the commencement of suit, and when returned and filed carried indorsements showing service on the president of the Haynes Company of Grand Rapids in the county of Montcalm by a Montcalm county deputy sheriff on November 16, 1916, and service upon the remainder of the defendants in the county of Kent by the sheriff of

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Kent county on the 23d and 24th days of November, 1916.

The summons with return of service, the affidavit of non-appearance, and the default in the Montcalm circuit case, were all filed on December 16, 1916, and judgment was rendered on January 2, 1917.

The copy of the summons served upon the defendants in Kent county contained nothing to notify the nonresident defendants that service had been made on any defendant in Montcalm county, and nothing appeared in the clerk's office to show that service had been made, until December 16, 1916.

The plaintiff in the Montcalm circuit case was a resident of Montcalm county, and all four defendants therein were residents of Kent county, and the Haynes Company of Grand Rapids is and was a domestic corporation with its principal office at the city of Grand Rapids, in said county of Kent. These facts appearing upon the trial of the instant case, upon motion of counsel for plaintiffs, the court directed a verdict and judgment for plaintiffs, holding that the Montcalm circuit court judgment was void for want of jurisdiction for the reasons, viz.:

(1) The sheriff's return of Montcalm county shows that the service was made upon the president of the Haynes Company of Grand Rapids, a corporation with principal office in Grand Rapids, which did not give the court jurisdiction because the corporation should be served in its own county.

(2) Because the sheriff's return of service had upon one of the defendants in Montcalm county was not filed with the county clerk until the 16th day of December, 1916, at the same time that the return of the sheriff for the county of Kent was filed, showing the service on the defendants residing in Kent county, and that the original summons with the return of both sheriffs indorsed thereon, was not filed with the county clerk of Montcalm county until the 16th day of December, 1916, and for that reason did not give the court jurisdiction to render a judgment against the defendants served in Kent county.

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The second ground of the holding by the trial court was because the copy of the summons served upon the defendants in Kent county contained nothing to notify those defendants that service had been made on any defendant in Montcalm county, and nothing appeared in the clerk's office in Montcalm county to show that service had been made until December 16, 1916. Defendant assigns error upon these rulings.

Subdivision 4 of § 27 of chapter 13 of the judicature act (3 Comp. Laws 1915, § 12430) contains the following language:

"When a personal transitory action at law is commenced in the county where the plaintiff resides, against a defendant or defendants residing without the county, service of process must be had in the county where the suit is commenced. If such service is had upon one defendant within such county, the remainder of the defendants may be served anywhere in the State."

Referring to the second ground of the objection, the trial court seems to have held that the amendment of the statute has not made any radical change as to service upon joint defendants, and provides such a service as was contemplated prior to the time of such amendment of the former statute. (3 Comp. Laws § 10010, as amended.)

It is conceded that the plaintiff Engel (one of the defendants in the assumpsit suit) had no notice by proof of service on file in the clerk's office or otherwise, that any defendant had been served in Montcalm county, and he had a right to believe that he was not subject to the jurisdiction of the Montcalm circuit court. In this ruling we think the trial court was correct. There is no question as to the rule of practice established by this court under the former statute. 2 Stevens Michigan Practice, p. 193; *Denison* v. *Smith*, 33 Mich. 155; *Clark* v. *Lichtenberg*, 33 Mich. 307;

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Baxter v. *Kent Circuit Judge*, 92 Mich. 291; *Allison* v. *Washtenaw Circuit Judge*, 104 Mich. 141, 146.

In the last cited case this court said:

"The rule is expressly stated that proof of service must be made before service can be had in another county. This rule was followed in *Clark* v. *Lichtenberg*, 33 Mich. 307. There was no proof of service on the defendants in Washtenaw county on file when the declaration was served on relator in Wayne county. The statute contemplates this as a condition precedent to service being made out of the county on another defendant. It was not cured by a return afterwards made showing actual service in Washtenaw county before the relator was served. * * * Evidence must exist in the clerk's office of the due personal service in the county where the suit is commenced before any other party can be served in another county."

See, also, *Hakes* v. *Macklin*, 170 Mich. 228, 231.

While the language of the statute has been somewhat changed by the amendment, we are satisfied that the practice should be held to remain substantially as formerly. Under our present rules the summons, instead of being directed to the sheriff, is directed to the defendants. Section 1 of Circuit Court Rule No. 18 contains the following language:

"If there be more than one defendant, the proof of service shall, at the request of the plaintiff, be made immediately after service on each defendant, and in such case the proof of service may be indorsed upon or attached to a copy of the writ, and the original retained until the return day for service on the other defendants."

We have no doubt that the correct practice under the amended statute and rule, makes it necessary to file proof of service of the writ upon the home defendant, in the office of the clerk of that court, before the original writ is sent into and served in another county, and that this practice is contemplated by the rule above referred to. There was no necessity for the issuing of an alias summons, but proof of service by

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the sheriff of Montcalm county should have been filed with the clerk of that court in the manner pointed out by the rule, before the summons was served upon the defendants in the county of Kent.

This conclusion being decisive of the case, renders it unnecessary to consider the other point presented. We are satisfied that the trial court did not err in holding that the circuit court for Montcalm county never obtained jurisdiction over the defendant Engel in that suit; and that the judgment as to him was void.

The judgment of the circuit court therefore is affirmed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

ARDIS *v.* GRAND RAPIDS & INDIANA RAILWAY CO.

1. CONTRACTS—CONSTRUCTION—INTENT.
   A contract must be construed so as to effectuate the intent of the parties when it was made, therefore it should be construed in the light of the circumstances existing at the time it was made.

2. SAME—CONSTRUED MOST STRONGLY AGAINST PARTY RESPONSIBLE FOR LANGUAGE USED.
   A contract drawn by one of the parties is subject to the rule of construction that it is to be construed most strongly against the party who is responsible for the language used.

3. SAME—CONTRACT—INTENT.
   A party to a contract will be held to that meaning which he knew the other party to the contract supposed the words to bear.

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4. SAME—ACCOUNTING—CONSTRUCTION—ACCEPTANCE.
In proceedings for an accounting under the terms of a written contract whereby a lumber company advanced money to a railroad company for the construction of a spur track, which was to be returned to it from the earnings of such spur, *held*, that if there was any ambiguity in the contract it was made clear by a letter written to plaintiff by defendant's superintendent subsequent to the making of the contract accepting the construction placed upon it by plaintiff.

5. EQUITY—ACCOUNTING—JURISDICTION.
The proceeding, being for an accounting, was properly brought in equity.

Appeal from Kent; Perkins, J. Submitted January 11, 1918. (Docket No. 42.) Decided March 27, 1918. Rehearing denied June 20, 1918.

Bill by Samuel B. Ardis against the Grand Rapids & Indiana Railway Company for an accounting. From a decree for plaintiff. defendant appeals. Affirmed.

Butterfield & Keeney, for plaintiff.
James H. Campbell, for defendant.

STONE, J. This case is before this court upon appeal by the defendant from the decree of the circuit court of the county of Kent, in chancery, in favor of the plaintiff for $4,000, and interest, being the full amount of his claim. The bill was filed for an accounting upon a contract between the copartnership, the Ardis Land & Lumber Company, and the defendant, and the case involves the construction of the written agreement of June 7, 1906, hereinafter set forth. The plaintiff has succeeded to all the rights of the copartnership lumber company.

In 1905, the Lake City branch of the defendant's railroad extended from its main line to Mynnings. The lumber company owned about 2,800 acres of land east of Mynnings. It had built a sawmill for the manufac-

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ture of hardwood lumber at Ardis, a point about three miles east of Mynnings. The lumber company desired a railroad to be extended from Mynnings to its mill at Ardis. There was other timber situated still further east which would come out, most conveniently, over the same road.

It was doubtless considered for the mutual benefit of the parties to build the extension. Under these circumstances two contracts were made by the parties. The first contract bears date November 1, 1905, and was as follows:

"This agreement made and entered into this first day of November, A. D. 1905, between the Grand Rapids and Indiana Railway Company, called hereinafter the Railway Company, as first party, and the Ardis Land and Lumber Company, a copartnership composed of Samuel B. Ardis and William Keelean, called hereinafter the Lumber Company, as second party, witnesseth:

"Whereas, the second party is the owner of timbered lands located near the Widdicomb Spur of the Lake City branch of the Railway Company's railroad, and is desirous of having the Railway Company construct a spur of about three miles in length to permit of the transportation of the timber cut from such lands, and from other lands which may be subsequently acquired, and

"Whereas, the Railway Company has agreed to construct such spur upon the terms and conditions hereinafter set forth,

"Now, therefore, in consideration of the premises, it is hereby covenanted and agreed:

"1. That the said spur will be constructed substantially upon the line indicated upon the blue print hereto attached and made a part hereof; the right of way therefor fifty feet in width, and such additional width as may be needed for the slopes of cuts and fills, and for side tracks and terminal facilities, to be acquired and furnished by said Lumber Company to the Railway Company free from all costs and expense, and the Lumber Company hereby agrees to convey the same to the Railway Company in fee at such time as it

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shall be requested to do so. The right of way and the track laid thereon, together with the appurtenances, shall be the property of the Railway Company, but the right of way shall revert to the Lumber Company, its successors or assigns, if at any time the Railway Company shall remove its track and cease to use the property for railroad purposes.

"2. The Lumber Company will grade the roadbed, making all necessary cuts and fills thereon, and place the same in condition to receive the ties, the same to be subject to the approval of the engineer of the Railway Company. The Lumber Company will also so furnish and distribute upon the roadbed in a manner satisfactory to the Railway Company, the ties which are to be of such description as shall be satisfactory to the Railway Company.

"3. The Railway Company will furnish the rails and other materials except the ties, and will construct and install the track upon the roadbed, putting in the necessary switches, and will maintain and keep the same in repair during the continuance of this agreement.

"The line of such spur as indicated upon the blue print hereto attached, may, if deemed necessary by the engineer of the Railway Company for engineering reasons, be deviated from in such manner as he shall deem requisite, and the right of way therefor shall be furnished in the manner and subject to the conditions herein set forth.

"4. The Railway Company may remove its track from the said roadbed, and discontinue the use of the same at its option after the expiration of five years from the date hereof, or at such prior time as the said Lumber Company shall have completed its lumbering operations in the neighborhood of such spur, or at such other time as the business of the said Lumber Company and such other business as can be done thereon, does not, in the judgment of the Railway Company's officers, warrant its further maintenance.

"5. The said Lumber Company, in consideration of the construction of such spur, agrees to furnish for out shipment over the said spur, and over the railroad of the Railway Company during a period of five years from the date of this instrument, not less than seven-

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teen hundred (1700) cars of forest products. In case the Lumber Company shall not so furnish the specified number of cars for shipment, it shall pay to the Railway Company its damage resulting from such failure, which shall be limited to, and shall be the actual cost to the Railway Company of constructing the track, of maintaining and operating the same during the period when in operation, and the removing of material when abandoned, together with the depreciation in value upon the material furnished by it, and the interest on the amount invested therein by the Railway Company at the rate of five per cent (5%) per annum for the time invested, less the sum of four (4) dollars per loaded car for each car shipped over the spur.

"6. The Lumber Company agrees to comply with all laws with regard to fencing the right of way, and to provide and maintain suitable crossings, cattle guards and signs where required, and to save harmless the Railway Company from any damage or expense resulting from its failure so to do, or for deficiency therein. The Railway Company shall, however, have the right to furnish and maintain, or furnish or maintain such fences, cattle guards, crossings or signs at its option at the expense of the Lumber Company.

"7. The Railway Company may at its option, for the purpose of reaching business of any character located beyond the plant of the Lumber Company, extend the said spur and conduct over the same any business which may result from such extension. The said spur as originally constructed, or as subsequently extended, shall not be confined to carrying the business of the Lumber Company, but any loaded cars hauled for others than the Lumber Company shall be included in the total of seventeen hundred (1700) cars to be furnished by the Lumber Company as provided in the preceding paragraph numbered five.

"8. The Railway Company constructs this spur in order to secure the freight shipped by or to the Lumber Company in connection with its lumbering business, and in consideration thereof, the Lumber Company agrees during the said period of five years to transport by the Railway Company's lines the property received or sent away by the Lumber Company in the transportation of which the Railway Company's

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lines can be used, and that all freight, the destination of which shall be over the lines operated by the Railway Company, shall, so far as the Lumber Company may be able to control the same, be so routed as to give the Railway Company the benefit of the longest possible haul over lines owned or operated by it.

"9. The Lumber Company assumes all risk of loss or injury by fire to its buildings or property situated upon, or adjacent to the said right of way.

"The Lumber Company assumes all risk of, and agrees to indemnify and save harmless the Railway Company against all loss or damage for injury by fire or in any other manner to persons or property whose presence near such railroad is caused by the business carried on by the Lumber Company, where such injury is not caused by the Railway Company's negligence.

"10. After the Lumber Company shall have ended its operations in connection with which the said spur track is to be built, and shall have fully performed all its agreements and obligations under this contract up to that time, it shall be discharged from all further obligations under this contract.

"11. The burden of removing snow and ice from the tracks covered by this agreement, shall rest wholly upon the Lumber Company, but the Railway Company shall assist in the same with its flangers or snow plows when necessary, provided that the same can be done without interference with work on its main line.

"12. The terms and conditions of this agreement shall extend to and be binding upon the successors, heirs and assigns of the parties hereto respectively.

"In witness whereof, the parties hereto have caused this agreement to be executed by the proper officers in duplicate, the day and year first above written.

"THE GRAND RAPIDS & INDIANA RAILWAY CO.,
"By W. R. SHELBY, Vice President.
"THE ARDIS LAND & LUMBER COMPANY,
"By SAMUEL B. ARDIS, WILLIAM KEELEAN."

The supplemental contract of June 7, 1906, was as follows:

"An agreement made the 7th day of June, A. D. 1906, between the Grand Rapids & Indiana Railway Company and the Ardis Land & Lumber Company, a

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copartnership composed of Samuel B. Ardis and William Keelean, supplementary to an agreement between the parties above named, dated Nov. 1, 1905, relating to a spur track connecting with the Widdicomb spur of the Lake City Branch of the Railway Company's railroad.

"The said parties do now hereby agree as follows:

"The Lumber Company has secured the right of way and has graded and prepared the roadbed and has delivered the ties on the ground ready for use for said spur, all at the cost to the Lumber Company of $4,000. It is now agreed that until the said expense shall be fully repaid to the Lumber Company, the Railway Company shall collect from all shippers or consignees other than the Ardis Land & Lumber Co. in addition to all other charges upon all shipments received by the Railway Company or delivered to it upon the said spur to be built for the Ardis Land & Lumber Co., $3.00 per car on all shipments in and out excepting wood, and upon wood $1.00 per car, such added charges not to be absorbed by the Railway Company, but to be paid by that company to the Ardis Land & Lumber Co. until such payment shall amount to the sums of $4,000.

"THE GRAND RAPIDS & INDIANA RAILWAY CO.,
"By W. R. SHELBY, Vice President.
"THE ARDIS LAND & LUMBER COMPANY,
"By WILLIAM KEELEAN, SAMUEL B. ARDIS."

The answer states that both of said contracts were executed at the same time, and in June or July, 1906. We think that the evidence shows that the first contract was prepared and approved in November, 1905, but probably was signed later, and after some work had been done by the Lumber Company thereunder. We deem the exact date of execution of the first contract unimportant. It is undisputed that the two contracts were executed, and they should be read together, and their true intent and meaning determined. The supplemental contract was transmitted in a letter dated June 11, 1906, to the lumber company, written by J. W. Hunter, the superintendent of the defendant. That letter was as follows:

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"GRAND RAPIDS, MICH., June 11, 1906.
"(In your reply refer to 8).
"ARDIS LAND & LUMBER CO.,
"Lake City, Mich.

"*Gentlemen:* I enclose draft of additional stipulation, providing that until your company shall be repaid the sum of $4,000, the cost to it of the right of way, roadbed and ties, the Railway Company shall collect $3.00 per car on all shipments in or out, excepting wood, and $1.00 per car on wood from all shippers other than your company, and pay the same to you.

"If satisfactory, will you kindly execute upon the part of your company and return for execution by this company.

"Yours truly,
"J. W. HUNTER, Superintendent."

Upon the hearing it was the claim of plaintiff that he, and Mr. Keelean, his partner, executed the contract of June 7, 1906, upon the understanding that the lumber company would be entitled to $3 per car on all shipments over the spur, excepting wood, and $1 per car on wood shipped over the spur, until they were reimbursed for their advances, to the extent of $4,000. The lumber company procured the right of way, graded the roadbed, furnished the ties and performed the stipulations of the contract by them agreed to be performed. In so doing it incurred an expense exceeding $4,000 and approximating $6,300; of which $4,000 had been spent as claimed by the plaintiff at the time the contract of June 7th was agreed upon.

At the hearing it was the claim of the plaintiff that the lumber company did more than under the contract it agreed to do in this: It obtained a right of way between Mynnings and Ardis 100 feet wide instead of 50 feet, as required in the contract. The deeds to the defendant from the landowners for rights of way were deeds in fee and contained no clause, as contemplated in the contract, to the effect that the

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right of way should revert to the lumber company, its successors or assigns, if at any time the defendant should remove its track and cease to use the property for railroad purposes. Also in the various deeds of the right of way as procured by the lumber company for the defendant, there was inserted at the request of the defendant, a clause, in substance, to the effect that the defendant should not be required to carry passengers upon such railroad, except at its election, and under such conditions as it might think proper, and that the defendant, its successors or assigns, should not be required to run passenger trains on said railroad, and that all rights, statutory or otherwise, to have passengers carried on said railroad, or to have passenger trains run thereon, were expressly waived by the grantors in said respective deeds, for themselves, their heirs, etc.

The rights of way so procured for the defendant cost the lumber company approximately $1,300, and in addition, the lumber company deeded some of its own land, and had to buy one or more tracts to get the right of way.

The railroad track to Ardis was completed about September 1, 1906. About a year and a half later, the defendant extended its track to Michelson, a distance of 11½ miles from the end of the Ardis spur—this extension was one complete operation—and the superintendent testified that it was first suggested in 1907.

Upon the extension from Ardis to Michelson, stations were established at Minthorn, 30 rods east of Ardis, Cummer & Diggins camp, at Merritt, at Carr & Barrett's camp, at Reedsburg, and at Michelson. The schedule in evidence shows that considerable quantities of lumber and wood have been shipped from these stations over the Ardis extension. Said schedule does not include any shipments made from Min-

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thorn, the point 30 rods east of Ardis, or any shipments after the year 1911. It appears from the testimony of defendant's rate clerk and auditor that the defendant has not charged $3 a car upon shipments other than wood to or from points on the extension east of Ardis, or a charge of $1 a car upon such shipments of wood. However, by the same testimony it is undisputed that the defendant obtained an amount approximately equivalent to $3 a car upon all such shipments. The method or manner by which this was done was as follows: The base rate for all shipments to central freight association territory was seven cents a hundred pounds from Mynnings, Ardis, Lake City, Cadillac, and all the adjacent territory. But, for shipments upon the 11-mile extension, between Ardis and Michelson, the rate of 7½ cents a hundred pounds was charged; the 7½ cent rate not applying to shipments at Ardis, or originating on the 3-mile Ardis spur, but solely to shipments on the extension east of Ardis. It also appeared that the average car of lumber weighs somewhat in excess of 60,000 pounds, and often as much as 80,000 pounds. Taking the average at 60,000 pounds, it appears that on lumber shipments originating on the Michelson extension, $3 a car was paid by the shipper, in addition to the rate charged to the plaintiff for shipments made at Ardis. By this means the defendant collected for itself approximately $3 a car, but such added charges were absorbed by the defendant, and were not paid to the lumber company, as the plaintiff claims they should have been. If these additional charges had been accounted for and paid to the lumber company, at the rate of $3 per car on all shipments except wood, and $1 per car on wood, they would, concededly, have been sufficient to repay to the lumber company the sum of $4,000. No part thereof has in fact been paid. The defendant has refused to pay these sums to plaintiff

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on the ground that practically all of the shipments originated not *on* the Ardis spur, but *east* of it. The position of the defendant is well expressed in its answer, wherein it states:

"The agreement dated June 7, 1906, was the carrying out of the suggestion made by the complainant orally to Mr. Hunter on or about September 1, 1905, as above stated, that his company should be paid something for cars loaded by others on the proposed extension, and later agreed to by the defendant. The agreement was as stated in the contract dated June 7, 1906, and was so perfectly and fully understood by both parties. The agreement of June 7, 1906, correctly and fully expresses the agreement of the parties on the subject. The understanding, agreement and intent of the parties was that the $3.00 per car on shipments, except wood, and $1.00 per car on wood in addition to all other charges, should be collected by the defendant, only upon shipments originating upon the said extension—that is, upon cars loaded by others than the Ardis Land & Lumber Company on the extension, and within the limits of the same and shipped out therefrom, and on shipments delivered to others on said extension. The purpose of the complainant in asking for said agreement was not for the reimbursement of the Lumber Company for the expense to it of said extension, but to give the Lumber Company control of the timber on lands along and in the vicinity of said extension which could be manufactured at the mill, so far as the same could be done by imposing said additional charges of $3.00 and $1.00 per car upon all shipments originating and delivered to the defendant by others than the Ardis Land & Lumber Company on said extension. This defendant did collect said additional charges upon all shipments originating upon and delivered to the defendant upon said extension by others than the Ardis Land & Lumber Company since the said extension was built, and on all shipments delivered to others on said extension. The aggregate of said charges so collected was $117."

The position of the plaintiff is:

First. That under the true interpretation of the

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contract of June 7, 1906, the lumber company is entitled to receive the stipulated sum per car, whether the shipment originated on the Ardis spur, or beyond it.

Second. If there were any ambiguity in the contract, it is made clear by Mr. Hunter's letter of June 11, 1906, with which the contract was transmitted.

Third. That if the contract leaves the matter in doubt, it is a mistake against which equity will relieve, in order to effectuate the true intent and meaning of the parties.

The learned chancellor who heard the testimony, in a written opinion, agreed with the first two contentions of plaintiff, finding it unnecessary to consider the third. He specifically found "that the railway company later, on all shipments 'in and out' of the Ardis spur actually did charge shippers one-half cent additional per hundred pounds on lumber, which, under the proofs, would average $3 per car, as the agreement provided."

It is elementary that a contract must be construed so as to effectuate the intent of the parties when it was made; and to ascertain the intent of the parties, a contract should be construed in the light of the circumstances existing at the time it was made. *Kunzie* v. *Nibbelink*, 199 Mich. 308.

It is urged by the plaintiff that this contract is to be read in the light of the circumstances attending its execution, and quotations are made from the following cases: *Ferris* v. *Wilcox*, 51 Mich. 105; *Uinta Tunnel, Mining & Trans. Co.* v. *Mining Co.*, 141 Fed. 563, 566; *Kauffman* v. *Raeder*, 108 Fed. 171, 175.

It is the claim of the plaintiff that under the true interpretation of the contract of June 7, 1906, the lumber company was entitled to receive the stipulated sum per car, whether the shipment originated on the Ardis spur, or beyond it. There are some conceded facts which are significant, and which should be borne in mind in considering the questions involved. At

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Mynnings and Ardis upon both sides of the spur track the timber had been taken off, and it was what is known as "cutover land." The amount of money that would be realized from a charge on the shipments made by others than the lumber company, and originating on this spur, would be so small, that it is inconceivable that the lumber company would have thought it worth while to enter into a contract concerning it. This has been demonstrated by the result of $117. It is reasonable to suppose that the parties had something else in mind. A careful reading of the testimony, and the documentary evidence, shows how the contract came to be made.

After the commencement of the construction of the Ardis spur, and after considerable money had been expended by the lumber company, the plaintiff and his partner learned that other parties intended to start lumbering operations east of their lands. There was no way in which this timber belonging to others could be drawn to market except over the Ardis extension or spur, then being constructed. It should be borne in mind that the original contract in its 7th paragraph contains the following language:

"The Railway Company may at its option, for the purpose of reaching business of any character located beyond the plant of the Lumber Company, extend the said spur, and conduct over the same any business which may result from such extension. The said spur as originally constructed, or as subsequently extended, shall not be confined to carrying the business of the Lumber Company," etc.

It will be noted that there was no provision which in any way obligated other persons or parties so sharing the benefits of this spur to bear with plaintiff's firm the burden of its construction. Prior to June 7, 1906, it had become apparent that the railway company would, or at least might, be called upon to extend this spur to assist new enterprises, and that the own-

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ers of additional mills would enjoy the use of the road constructed at the expense of the lumber company.

Under these circumstances, the plaintiff and his partner met Mr. Hunter, and the matter was discussed. We find no clear contradiction of the testimony of the plaintiff and Mr. Keelean upon this subject. They said to him that other lumbermen were buying timber beyond the easterly end of the Ardis spur as then projected. They named the lumbermen who were making such purchases of timber. They said that the timber which these men were buying would be drawn over the Ardis extension; that, under these circumstances, it was not fair that the lumber company should pay the expense of constructing the spur, and that others should get the benefit thereof; and that the cost of the spur ought to be refunded by the defendant to the lumber company. According to the testimony of the plaintiff and his partner, Mr. Hunter replied that the proposition was a fair one, and subsequently the contract of June 7, 1906, was drafted in order to carry this agreement into effect. We find no evidence of any talk between the parties that those sums would not be paid to the lumber company unless the freight originated on the Ardis extension. In fact the word "originated" does not appear in the contract. It was first used by Mr. Hunter in his letter of December 21, 1909. Both contracts were drawn by the defendant's officials and counsel. This being so, the rule is that they must be most strongly construed against the party who prepared them, and who is responsible for the language used. *Thomson Electric Welding Co.* v. *Fence Co.*, 190 Mich. 496.

In our opinion the contract is capable of the construction contended for by the plaintiff and is not ambiguous, and we agree with the chancellor in that regard. If it can be said that there is any ambiguity

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in the contract of June 7th, it is made clear by Mr. Hunter's accompanying letter. In it he said:

"The Railway Company shall collect $3 per car, on all shipments in or out excepting wood, and $1 per car on wood, from all shippers other than your company, and pay the same to you."

Under such circumstances it has been held that a party will be held to that meaning which he knew the other party to the contract supposed the words to bear. *San Jacinto Oil Co.* v. *Power Co.*, 41 Tex. Civ. App. 293.

In *Tallcot* v. *Arnold*, 61 N. Y. 616, it was said:

"The promise must be interpreted in the sense in which the promisee knew or had reason to know that the promisor understood it."

Many other authorities might be cited to the same effect.

One cannot examine the record without being satisfied that on reading Mr. Hunter's letter, plaintiff and his partner understood that the contract meant just what the letter said it did. They were, we think, entitled to rest upon the interpretation placed upon the contract by the defendant's superintendent. *Snead & Co. Iron Works* v. *Trust Co.*, 225 Ill. 442.

In our opinion the suit was properly brought in equity for an accounting. *Warren* v. *Holbrook*, 95 Mich. 185, 189.

We think the chancellor reached the correct conclusion, and the decree below is affirmed, with costs to plaintiff.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, FELLOWS, and KUHN, JJ., concurred. BROOKE, J., did not sit.

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BUGAJSKI *v.* SIWKA.

1. VENDOR AND PURCHASER—TIME OF PERFORMANCE—EXTENSION—FORFEITURE—WAIVER.

   The parties to a land contract may by oral agreement extend the time originally stipulated for the payment thereunder, and such agreement operates as a waiver of the vendor of the right to rescind or forfeit for failure of the vendee to comply strictly with its provisions providing for payment.

2. SAME—FAILURE OF VENDOR'S TITLE—RIGHTS OF VENDEE—FORFEITURE.

   Where the vendor's title to premises agreed to be conveyed by a land contract was decreed to be void in a chancery case, the vendees had the right to make terms with the holder of the legal title without forfeiting their right to recover damages for the breach of the contract to convey.

3. SAME—BREACH OF CONTRACT—PAYMENT—TENDER.

   Where the vendor's power to perform was rendered impossible by reason of a decree in chancery extinguishing his title, the vendees were excused from tendering payment.

4. SAME—BREACH OF CONTRACT—MEASURE OF DAMAGES.

   In an action by the vendees for damages for the breach of a land contract, where the vendor never had any title to the premises he agreed to convey and was unable to perform, the measure of damages is the difference between the actual value of the premises at the time of the breach and the sum agreed to be paid by the terms of the contract.

Error to Wayne; Mandell, J. Submitted January 24, 1918. (Docket No. 190.) Decided March 27, 1918.

Assumpsit by John Bugajski and another against John Siwka for breach of a land contract. Judgment for plaintiff on a directed verdict for less than the amount claimed. Plaintiffs bring error. Reversed.

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E. A. Fink and *B. F. Mostowski*, for appellants.

John Kaminski (*August Cyrowski*, of counsel), for appellee.

STONE, J. Action of assumpsit to recover damages for nonperformance by the defendant, the vendor, of a written land contract. The parties are all Polish people. On or about February 1, 1910, the plaintiffs, husband and wife, being desirous of purchasing a home for themselves, went to the defendant, who claimed to be the owner of a house and lot known as No. 1271 Chene street in the city of Detroit. After an examination of the premises a written contract was entered into by the parties, bearing date February 1, 1910. By the terms of the contract the defendant (party of the first part) in consideration of the sum of $3,000 to be to him duly paid, agreed to sell to the plaintiffs (parties of the second part) the premises, describing them, for the said sum, which the plaintiffs agreed to pay as follows: $300 at the date thereof, and the remaining $2,700 to be paid in instalments of $50, or more, each and every 6 months thereafter, with the agreement that the total amount due under the contract was to be paid within 3 years from the date thereof, with interest on all sums at any time unpaid thereon at the rate of 6 per cent. per annum till paid, payable semi-annually from the date thereof. Plaintiffs also agreed to pay all taxes and assessments that should be taxed or assessed on said premises. Also insurance upon the building, in manner and amount approved by the defendant.

It was further provided in said contract, that on receiving the said payments in full, the defendant should, at his own proper cost and expense, execute and deliver to the plaintiffs, or to their assigns, a good and sufficient conveyance, in fee simple, of said described premises, free and clear of, and from, all liens

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and incumbrances. The plaintiffs were to have possession of the premises on and after the date of the contract, while they should not be in default on their part in carrying out the terms thereof.

The initial payment made was $350 instead of $300. The indorsements on the contract in evidence show that payments were regularly made of $50 and interest every 6 months for 3 years to February, 1913, after which date only interest payments were made every 6 months, for 2½ years longer. During all of the time plaintiffs also paid insurance and taxes, and kept up the property, and made some improvements thereon.

After going into possession, the plaintiffs heard some rumor respecting defendant's title to the property. They went to defendant about it, and he told them he was the owner.

On June 13, 1912, one Victor Jackiewicz filed a bill in the Wayne circuit court, in chancery, against John Siwka, the defendant, making these plaintiffs also defendants, claiming title to the property. The decree in that case (affirmed on appeal in this court in 187 Mich. 165) confirmed title to the property in question in said Jackiewicz, and was to the effect that defendant had no title, and hence that the plaintiffs in the instant case had no rights in the property under their said contract of purchase. Pursuant to such decree, Jackiewicz obtained a writ of assistance and dispossessed plaintiffs; or rather, compelled them to pay him rent, as his tenants, beginning September 1, 1915.

During the pendency of the chancery case, plaintiffs herein remained in possession of the premises, paying the taxes, insurance, and other charges upon the property, and defendant regularly collected from them the payments provided for in the land contract, except that after the regular payment of February 1, 1913,

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he told plaintiffs they need pay nothing further on the principal until the chancery case was decided.

Thereafter they paid defendant only the interest on the contract balance every 6 months up to August 1, 1915. After September 1, 1915, the plaintiffs were obliged to either surrender possession or pay rent to Jackiewicz, and they accordingly paid him rent thereafter. All rights in the property were lost to the plaintiffs. They went to the defendant about it. At first he told them he would settle the matter with them in some way, but he never did, and finally said to them: "We can't settle it. The court will settle the matter for us."

About six months later, being unable to bring defendant to any settlement, plaintiffs brought this suit, claiming damages for the difference between what they still owed defendant, under their contract, and the value of the property at the time of their dispossession of it. There were two special counts and also the common counts in the declaration. In the first count, after setting forth the contract, it was alleged that the representations of the defendant that he was the owner of the premises were not true, and were fraudulently made by him, knowing them to be false; and that the plaintiffs, by reason of the misrepresentations and frauds so practiced upon them by the said defendant, have lost all of the money which they paid to the said defendant under said contract, as well as all improvements made upon the premises, and also the increase in value of the said premises over and above the price which they agreed to pay therefor, etc.

The second count, although charging no misrepresentations or fraud alleges that the title of said defendant to said premises had wholly failed, and that Victor Jackiewicz had established a superior and paramount title, by virtue of which plaintiffs had been

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divested of their right of possession, and that defendant had been rendered unable to perform his said agreement, claiming damages, as in the first count stated.

Upon the trial, plaintiffs offered evidence of the value of the premises, and tending to show that the property had greatly increased in value between the date of the contract and the time the plaintiffs had been dispossessed; claiming upwards of $5,000 damages, and that the property had actually been sold for $7,000.

At the conclusion of the testimony, the trial court, in effect, held that plaintiffs were not entitled to recover any of said alleged damages, but could recover only the money they had paid, less the benefits received by the use of the property, because, before the commencement of their suit, they did not tender to defendant, the full amount, or balance, then due and unpaid under the contract, and directed a verdict and judgment in favor of the plaintiffs for $547.96 only.

The plaintiffs have brought error, and this action of the trial court in denying to plaintiffs recovery of their damages, and limiting them in their recovery to the money they had paid, less their benefits, constitutes the principal error assigned and relied upon.

It was competent for the parties by oral agreement to extend the time originally stipulated in the contract for the payment of the instalment of principal thereof, and this agreement operated as a waiver of the vendor of the right to rescind, or forfeit the contract for the failure of the purchaser to comply strictly with the terms thereof, relating to payments. 39 Cyc. p. 1393, and cases cited in note, including *Ortmann* v. *National Bank*, 49 Mich. 56.

When defendant's title had become extinguished, plaintiffs had the right to make terms with the holder

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of the legal title, for possession of the premises. *Harrington* v. *Sheldon*, 196 Mich. 388.

By virtue of the decree in the chancery case the defendant's title was extinguished, and it was not in his power to perform his contract, and the plaintiffs were excused from tendering payment. *Morange* v. *Morris*, 3 Keyes (N. Y.), 48; *Lowe* v. *Harwood*, 139 Mass. 133.

The purchase money need not be tendered by the vendee, when the vendor is unable to convey the land. 28 Am. & Eng. Enc. Law (2d Ed.), p. 9, and cases cited in note.

"The fact that the vendor has no title to the land, or is for any reason unable to perform, will relieve the purchaser from his obligation to pay, or tender the purchase-money, but it will not exempt the vendor from his obligation to convey or tender a conveyance, or discharge him from liability to an action for damages for breach of contract, unless he is excused under the terms of his contract. Therefore, if one contracting to sell land to which he has no title at the time of the contract is unable to procure title from the owner, so that he cannot comply with his contract to convey, this does not excuse his default, and he will be liable to a suit on the contract, unless he protects himself by the terms of the contract." 39 Cyc. p. 1544, and cases cited in note, including *Miller* v. *Smith*, 140 Mich. 524.

It would have been entirely useless to make the tender, and demand a deed. The law will not indulge in idle formalities.

There was evidence tending to show a wilful breach on the part of the defendant. He never had title to the premises.

We are of the opinion that under our own cases, the plaintiffs were entitled to maintain this action, and that their measure of damages is the difference between the actual value of the premises at the time of the breach, and the sum agreed to be paid by the

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terms of the contract. *Allen* v. *Atkinson*, 21 Mich. 351; *Way* v. *Root*, 174 Mich. 418.

The judgment of the circuit court is reversed, with costs to appellants, and a new trial is granted.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred.

FRIEDRICH MUSIC HOUSE *v.* HARRIS.

1. INNKEEPERS—LIEN—STATUTES—CONSTRUCTION—INTENT.
   Section 6947, 2 Comp. Laws 1915, giving the keeper of a hotel, inn, or boarding or lodging house a lien on the baggage and effects of a guest or boarder for food and lodging, *held*, from the association of the words "hotel or inn or boarding or lodging house" that the legislature had in mind business of a kindred and public nature.

2. REPLEVIN—LIENS—INNKEEPERS—CONDITIONAL SALE.
   Where the evidence showed that defendant in replevin proceedings kept one or two steady boarders in her family, but without any pretense or claim of running a boarding house, she was not the keeper of a boarding house within the meaning of section 6947, 2 Comp Laws 1915, giving the keeper of a boarding house a lien on the baggage and effects of a guest or boarder for food and lodging, and she was not entitled to hold the effects of a boarder as against the vendor who had retained title to the same.

Error to Kent; Brown, J. Submitted January 30, 1918. (Docket No. 83.) Decided March 27, 1918.

Replevin by the Friedrich Music House against Mrs. William Harris for the possession of a piano. Judgment for plaintiff. Defendant brings error. Affirmed.

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C. H. Gleason (*Gleason & Lee*, of counsel), for appellant.

Maynard, Freeland & Munshaw, for appellee.

STONE, J. This is an action of replevin commenced in justice's court in the city of Grand Rapids for the alleged unlawful detention of one Hoffman piano, stool and scarf, and one talking machine with horn, also a quantity of phonograph records. The goods were taken on the writ. Defendant pleaded the general issue and gave notice of a lien on the property for the board of two ladies who were the owners of the property. Defendant had judgment for a return of the property before the justice, and the plaintiff took an appeal to the circuit court, and there, upon a trial before the court, without a jury, had judgment for the goods, and for six cents damages and costs. The defendant brings the case to this court by writ of error.

It appeared in evidence upon the trial in the circuit court that Julius A. J. Friedrich was a music dealer in the city of Grand Rapids. He sold one "Hoffman piano, stool and scarf," being a part of the property in question to Mrs. Belle Ely, December 26, 1913, for $165, on a down payment of $25, and then $5 per month. For this sum Mrs. Ely gave her promissory note, and at the same time signed a contract with Mr. Friedrich, by which he retained title until the property was paid for. This contract described Mrs. Ely's residence as "corner of Benjamin and Dunham," she agreeing not to permit the property to be "removed from said residence without the written consent" of the seller.

On April 13, 1914, said Friedrich sold to Jeannette Ely, daughter of Mrs. Belle Ely, who was living with her mother, one "Victor No. 31 Wood Horn." The purchaser made a down payment, and gave a prom-

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issory note for the balance of $78.75 payable in monthly instalments of $5 each. This note retained title to the horn until fully paid for, and provided that the property should not "be removed from Grand Rapids, Mich., without the written consent" of said Friedrich. These notes, when this suit was begun, belonged to the plaintiff herein, and it demanded possession of the property replevined before suit was brought. At the time suit was brought, there was no default in the payments due on either of said notes, and there was no breach of any of the terms of either contract, except in the case of Mrs. Ely, who had removed the piano, stool, and scarf from her residence without written consent of Mr. Friedrich. About June 1, 1914, Mrs. Ely and her said daughter went to board with the defendant at her home, 922 Prince street, in said city, and took their things there with them, including all of the property replevined. They both lived and boarded with defendant for upwards of five weeks, when they left defendant's house in her absence therefrom, and without her knowledge or consent took the greater portion of their things with them, but did not take any of the property described in the writ of replevin. They were at that time owing defendant $40 for board. For this sum defendant claimed a lien on the said property, as the keeper of a boarding house, and refused to deliver it to the plaintiff, until the board bill was paid.

It also appeared upon the trial that this suit was brought by plaintiff by authority of Mrs. Ely, who wanted plaintiff to get the property for herself and daughter in order that defendant's claimed lien thereon for their board might be defeated.

Upon the trial defendant testified:

"I have kept boarders for twelve years. During the year preceding this, Mr. Frank was with me; he was there one and one-half years. Mr. and Mrs. Jacobs

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were there more than a year. They were not friends of mine, just simply wanted a private boarding house. Mr. and Mrs. Danforth boarded with me over a year. This was prior to the last year. Miss Ocobock also boarded with me the past year. She is no relation to me, came a perfect stranger. She boarded with me nearly two years. Pete Franken boarded with me eight months two years ago. I can accommodate only one or two at a time. I keep a boarding house for people that will pay their board. My mother-in-law boarded with me, also. Transients do not come there. I don't run an open house like that. I only have a few regular boarders. I don't hold myself out as keeping a public boarding house. I knew Mrs. Ely only three or four days before she came to board with me. She stayed there five weeks and three days."

Defendant's daughter, Amy Harris, testified:

"I am daughter of defendant and lived with her when Mrs. Ely boarded there. She and her daughter boarded there about five weeks, and owed mother $40 for board when they left, which they have never paid. My mother keeps a private boarding house, has kept one about twelve years, and has two boarders now, and when the Elys boarded there my grandmother also boarded there."

The above was all the testimony on the subject. Upon this testimony the trial court found as matter of law that defendant was not, during the time the Elys boarded with her, a boarding house keeper within the meaning of section 5317, 2 Comp. Laws (§ 6947, 2 Comp. Laws 1915).

Defendant proposed amendments to the findings which were refused, and exceptions were duly taken to such refusal.

The assignments of error allege error in the several findings both of fact and of law, and, further, that the findings of fact do not sustain the conclusions of law, and that each finding was against the clear weight of the evidence.

Under the undisputed evidence in the case, in fact

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upon defendant's own testimony, we are of opinion that she was not a boarding house keeper within the purview of our statute. The statute provides:

"That whenever the keeper of any hotel, or inn, or boarding, or lodging house, shall receive into his hotel, or inn or boarding, or lodging house, any person as a guest or boarder or lodger, he shall have a lien upon, and a right to detain the baggage and effects of such guest or boarder, or lodger, to secure and compel payment of his customary charges for the food and lodging furnished such guest, or boarder, or lodger, and such lien may be enforced in the manner hereinafter prescribed."

A "boarding house," within the meaning of this statute, was well defined in *Cady* v. *McDowell*, 1 Lans. (N. Y.) 484, from which we quote as follows:

"A boarding house is not, in common parlance or in legal meaning, every private house where one or more boarders are kept occasionally only, and upon special considerations. But it is a *quasi* public house, where boarders are generally and habitually kept, and which is held out and well known as a place of entertainment of that kind. * * * A boarding house is as well known and as distinguishable from other houses, in every city and village in the country, as an inn or a tavern. It is a house where the business of keeping boarders generally, is carried on, and which is held out by the owner as a place where boarders are kept."

See, also, 8 C. J. p. 1132, and cases cited in notes.

See note to *Nance* v. *Piano Co.*, 128 Tenn. 1, as reported in Am. & Eng. Ann. Cas. 1914D, 839, Black's Law Dictionary, title, "Boarding House," 1 Words & Phrases, p. 815.

Although defendant claimed to have kept a boarding house 12 years, upon being interrogated she named only 10 persons who had boarded with her during that time, including Mrs. Ely and daughter, and her own mother-in-law; and she testified that she only accommodated one or two at a time.

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We think from this record it appears that Mrs. Harris and her family were living on Prince street, during the period named and were doing what many other families are doing, in cities and towns, keeping one or two steady boarders; but without any pretense or claim of running a boarding house. The statute should be given a fair construction. The association of the words "hotel or inn or boarding or lodging house," shows that the legislature had in mind business of a kindred and public nature. The use of the words "customary charges," in the statute, implies an habitual and customary business.

It appears to us, therefore, that there is an insuperable reason why the defendant cannot prevail in the instant case. She was a stranger to the property in question, and the plaintiff, the bailor of the property, had, under the evidence, as to her, the right to the possession of the property.

The judgment of the circuit court is therefore affirmed.

BIRD, MOORE, STEERE, BROOKE, and FELLOWS, JJ., concurred. OSTRANDER, C. J., and KUHN, J., did not sit.

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LEE v. HEDENSKOOG.

1. EQUITY—JURISDICTION—MONEY DECREE—ADEQUATE REMEDY AT LAW.

On a bill by the heirs of a deceased partner against the surviving partner praying for an accounting, that a certain contract to purchase plaintiffs' interest be decreed to be a valid and binding obligation upon defendant, and for the appointment of a receiver, where, from counsel's statement at the hearing, it was made clear that all that plaintiffs sought was a money decree, the court of equity had no jurisdiction, and plaintiffs should have been remitted to their action at law.

2. CONTRACTS—PARTNERSHIP — MEETING OF MINDS — CONDITIONAL ACCEPTANCE.

Where an offer by the heirs of a deceased partner to sell deceased's interest in the partnership business to the surviving partner was accepted conditional upon defendant's verifying certain figures, and nothing further was done, the minds of the parties never met, and no valid, binding contract was made.

Appeal from Muskegon; Sullivan, J. Submitted January 17, 1918. (Docket No. 108.) Decided March 27, 1918.

Bill by Charles H. H. Lee and another against Ernest Hedenskoog for an accounting and for other relief. From a decree for plaintiffs, defendant appeals. Reversed, and remanded for an accounting.

Clink & Farmer, for plaintiffs.

Carpenter & Jackson (*Charles B. Cross*, of counsel), for defendant.

STONE, J. The plaintiffs are the children, and only heirs at law, of Kittie M. Lee, deceased, formerly of Muskegon, Michigan, and are the owners of her entire interest in the property of the firm called the

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"Occidental Club." Mrs. Lee, in her lifetime, and the defendant were partners under the firm name and style of the Occidental Club, their business being the conducting of billiard rooms and bowling alleys in the city of Muskegon. The agreement under which they operated is as follows:

"Whereas, a contract has this day been entered into between Ernest Hedenskoog, as first party, and Kittie M. Lee, as second party, covering the business to be known as the Occidental Club. This contract to cover a period of ten years unless otherwise mutually agreed.

"Whereas, Kittie M. Lee, party of the second part, is to furnish Ernest Hedenskoog, party of the first part, five thousand ($5,000) dollars, more or less,

"Now, therefore, it is agreed, between said Ernest Hedenskoog, party of the first part, and Kittie M. Lee, party of the second part, as follows:

"*First.* Second party will advance to said first party such sums as may be required to commence and conduct said business, the sum not to exceed five thousand ($5,000) dollars.

"*Second.* First party, in consideration of said second party's advancing said sum of money agrees that said second party shall be reimbursed the money advanced by her, together with interest at six per cent per annum on such investments, all to be paid out of the earnings of said business and said second party is also to receive in addition thereto one-half of the net profits of said business after said first and second parties have been repaid the amounts advanced by them respectively.

"*Third.* In case said business is to be sold at any time both first and second parties must be agreeable to the transaction and each party must receive all moneys advanced, interests accrued and one-half of the profits up to date of transfer.

"In case such business is not operated at a profit and there should be a loss, each first and second party is to stand one-half the loss.

"*Fourth.* It is mutually agreed between Ernest Hedenskoog, party of the first part, and Kittie M. Lee, party of the second part, of the within contract

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that in case of the death of either party the survivor shall have full power to continue the business without interference from the heirs of the deceased. All contracts and rights which the two now hold individually shall be vested in the survivor.

"*Fifth.* In case the death of the party of the first part should occur before the party of the second part, I, Ernest Hedenskoog, assign to Kittie M. Lee, party of the second (part,) the contract between the Occidental Hotel Company and myself (Ernest Hedenskoog), with all the rights I now possess.

"*Sixth.* All debts must be paid out of the earnings of the Occidental Club before any division can be made of the earnings, after which both first and second parties or their heirs shall receive equal amounts share and share alike. These payments to be made in cash the first of every month, leaving cash at the bank to cover incidental expenses until more is earned.

"*Seventh.* This contract is to date back to March 24, 1913, in lieu of one given at that date and be operative from that date.

"Muskegon, Michigan, April 11, 1914.

"ERNEST HEDENSKOOG,
"KITTIE M. LEE.

"Witness:
"SARAH VANORMAN."

Mrs. Lee died on June 24, 1915. On the 12th day of November, 1915, the plaintiffs and defendant made the following instruments, which were signed as indicated below:

"MUSKEGON, MICH., November 12, 1915.

"An audit of the Occidental Club books, shows that Mrs. Kittie M. Lee has an interest in the club amounting to $6,555.50.

"Now, therefore, if upon examination I can prove these figures to be correct, I hereby offer to pay for her interest the sum of $5,000. If her interest is found to be more than $6,555.50 then my offer shall increase proportionately. If her interest is found to be less than $6,555.50, then my offer shall decrease proportionately.

(Signed) "ERNEST HEDENSKOOG.

"Witness: MILTON C. NELLIS."

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Upon the back of this paper appears the following:

"The proposition herein made is accepted—bill of sale to be made November 16, 1915, cash payment $3,000—balance to be arranged by two 6 months' 6% notes, satisfactorily endorsed.

(Signed) "KATE B. NELLIS,
"CHARLES H. H. LEE.

"Witness:
"MILTON C. NELLIS."

The undisputed evidence shows that these two instruments were made and signed by the respective parties at the same time.

Defendant claimed, immediately after these papers were signed, as above indicated, that what he had obtained was a mere option to purchase this property. That was denied by the plaintiffs. At all events the matter was never closed, and the business continued to drift along after the making of these papers, as it had before.

On the 28th day of December, 1916, the plaintiffs filed their bill of complaint, setting forth substantially the instruments appearing above, claiming that the last papers operated as a valid contract to sell on the part of the plaintiffs, and to buy on the part of the defendant, the interest which Mrs. Lee's estate had in the Occidental Club. The bill alleged misconduct and mismanagement of the business on the part of the defendant; that he was financially irresponsible, and asked to have a receiver appointed. The bill prayed:

(*a*) That said defendant should come to a full, fair and just accounting with plaintiffs in respect to the business of said Occidental Club.

(*b*) That said contract to purchase from plaintiffs their interest in the business of the said club by the said defendant be decreed by the court to be a valid and binding obligation upon said defendant, and in full force and effect.

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It prayed for the appointment of a receiver, and for general relief.

Upon the filing of the bill, an order to show cause why a receiver should not be appointed was made, to be heard on December 30, 1916, at 9 o'clock a. m. At that hearing it appears that the answer of the defendant was filed, in which it was admitted that Kittie M. Lee had paid into this business, as alleged in the bill, substantially the sum of $6,555.50, or thereabouts.

The defendant denied the validity of the alleged contract and that he had ever agreed to purchase the interest of the plaintiffs in the business, and set up the circumstances which he claimed constituted the said instrument, signed by the parties, to be an option to purchase, only. He admitted that he had continued to operate and conduct the business since the death of Mrs. Lee; denied all misconduct and mismanagement in the same; alleged that he had kept proper books of account, or had arranged for their keeping; denied that he was financially irresponsible, and described somewhat in detail the amount of property which he had, and claimed the benefit of a demurrer upon the ground that the plaintiffs had no standing in equity, and that their remedy, if any, was in a court of law, and that they had a complete and adequate remedy at law. This answer was supported by numerous affidavits, and upon the hearing on the order to show cause the circuit judge refused to appoint a receiver.

The case came on for hearing upon the pleadings and proofs in July, 1917, and counsel for the plaintiffs made an opening statement of the plaintiffs' claims, and referred to the copartnership existing between Mrs. Lee and the defendant, to the admission of the amount of money which she had paid in, and the heirship of the plaintiffs, and to their coming together and signing the papers of November 12, 1915, which

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we have set forth above. The statement of counsel continued as follows:

"Our position is that that made a complete contract, and they ought to be required to keep that contract. That is all that we claim in this matter at this time.

"*The Court:* Is that a fair statement of the issue?

"*Defendant's Counsel:* It is if they are waiving all the other portions of the bill of complaint.

"*The Court:* Go ahead. See if I got this right. All you really claim now is judgment for the sum of $5,000, with interest from that time to this time?

"*Plaintiffs' Counsel:* That is what our claim is, that a decree of this court should hold that that is a valid, binding contract, and that it is his duty to carry it out, and that a decree should pass against him for that amount.

"*The Court:* And in relation to the property itself?

"*Plaintiffs' Counsel:* The property itself should be held subject to that payment."

Whereupon the case proceeded, and a decree was entered in favor of the plaintiffs holding the alleged contract to be valid, and for $4,828, with interest at 5 per cent. per annum to be computed from the 16th day of November, 1915, giving defendant a credit of $189.90, the amount of a certain check received by one of the plaintiffs, making a total decree of $5,053.24. This decree gave an equitable lien on the physical property of the Occidental Club for the amount of the plaintiffs' claim, and ordered a sale of the same at public auction, with a decree for any deficiency there might be, as in the case of a foreclosure of a real estate mortgage. The defendant has appealed from that decree, and it is claimed by his counsel in this court, among other things, that there was involved at the hearing at most only the right of the plaintiffs to recover a money decree for the amount, if any, payable upon the so-called contract, and that the case stood at the time of the trial, exactly as if that were all there was in the bill; that a court of law was as competent as

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a court of equity to determine whether the contract was valid or not; and, if so, to construe the same and give it effect; that the plaintiffs had a full, complete and adequate remedy at law; that the only thing sought by the plaintiffs in their bill as the case finally went to hearing, and as announced by counsel in court, was a money judgment; and that under those circumstances and the rulings of this court the plaintiffs should have been remitted to their action at law. Citing *Bennett* v. *Nichols*, 12 Mich. 21; *Bay City Bridge Co.* v. *Etten*, 36 Mich. 210; *Prescott* v. *Pfeiffer*, 57 Mich. 21; *Mack* v. *Village of Frankfort*, 123 Mich. 421; *Detroit Trust Co.* v. *National Bank*, 155 Mich. 61; *Laubengayer* v. *Rohde*, 167 Mich. 605; *Lannin* v. *Lynn*, 184 Mich. 325.

The second claim of the defendant in this court was that there never was a completed contract between the parties by which the defendant agreed to purchase, and the plaintiffs to sell, to him, the interest owned by Kittie M. Lee in the Occidental Club for a sum agreed upon; that the contract, as claimed, consisted of two parts; a proposition signed by the defendant, and a qualified acceptance signed by the plaintiffs; that the proposition stated a conditional amount to be paid, without stating the time or method of payment; that the so-called acceptance stated a time, to wit: November 16, 1915, and payment to be made by cash $3,000, and by two 6 months' notes with interest at 6 per cent., to be satisfactorily indorsed. It was urged that the so-called acceptance was therefore not an unconditional acceptance, but a qualified acceptance which called for further action on the part of the defendant thereto, before any contract could be made; that it was in effect a new proposition for a different contract. The following cases were cited by defendant's counsel in support of the claim that no contract

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resulted, it being the claim of the plaintiffs that the question of contract or no contract must rest upon these two papers, and upon them alone: *Johnson* v. *Stephenson,* 26 Mich. 63; *Bowen* v. *McCarthy,* 85 Mich. 26; *Wardell* v. *Williams,* 62 Mich. 50; *Wilkin Manfg. Co.* v. *Lumber Co.,* 94 Mich. 158; *United States Heater Co.* v. *Applebaum,* 126 Mich. 296, and cases there cited; *Travis* v. *Watson,* 134 Mich. 249.

1. From the statement made by plaintiffs' counsel upon the hearing it is made very clear, that all that the plaintiffs sought was a money decree. While the plaintiffs had by their bill of complaint prayed for an accounting, yet at the hearing no accounting was claimed, or had, on the partnership affairs. It is very apparent that a court of law was just as competent, as was a court of equity, to award a money judgment, and that plaintiffs could not use the chancery forum for the purpose, simply, of obtaining a money decree. We think the court of equity had no jurisdiction, and that the plaintiffs should have been sent to a court of law, if there was a valid and completed contract, existing between the parties.

2. But it appears to us that the court was in error in holding that any contract was made by the parties, or that the minds of the parties ever met by what was done on November 12, 1915. The instrument signed by the plaintiffs was not an unqualified acceptance of the proposition of the defendant. The language used by the defendant was significant:

"Now, therefore, if upon examination I can prove these figures to be correct, I hereby offer to pay for her interest the sum of $5,000."

It is very clear to us that, by this offer the defendant expected to have time, and opportunity, to make such examination in order to prove the correct amount of the interest of Mrs. Lee in the Occidental Club property; and if her interest was found to be more

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than the sum stated, the offer would be increased proportionately; and if found to be less, then his offer was to decrease proportionately.

Upon the hearing of the case the defendant's position was that, in any event, the amount proved against him was much less than $3,000. The so-called acceptance demanded the payment of $3,000 absolutely, and the balance to be arranged by two 6 months' notes, bearing interest at 6 per cent., to be satisfactorily indorsed. What indorsers would be satisfactory was left at large. A bill of sale was to be made on the 16th day of November, four days hence, whereas an examination of the books might necessitate a much longer time. No bill of sale was ever tendered by plaintiffs. That the instrument signed by the plaintiffs was not an unconditional acceptance of defendant's offer is manifest upon the reading of same.

In *Wilkin Manfg. Co.* v. *Lumber Co.*, *supra*, this court quoted, with approval, the following language from Bishop on Contracts, §§ 322, 323:

"If one makes to another an offer, verbal or written, * * * of a sort implying nothing to be done except to accept or decline, and the latter accepts it, adding no qualification, there is thus constituted a mutual consent to the same thing at the same time; in other words, a contract. And the question of the sufficiency of the transaction to work this result is of law for the court. On the other hand, though there is an acceptance, if it is not to the exact thing offered, or if it is accompanied by any conditions or reservations, however slight, in time, or otherwise, no contract is made. It is so, for example, where new terms are introduced; they constitute an offer on the other side, and leave the question open."

In a note to *Eskridge* v. *Glover*, 26 Am. Dec. 349 (5 Stewart & Porter [Ala.], 264), it is said:

"If the acceptance do attach any new condition or fall short of the terms proposed, it is not only insuffi-

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cient as an acceptance, but is also a rejection of the proposal, and a termination of the liability of the proposer, to be bound by a subsequent acceptance conforming to the terms of his proposal."

These rules have been frequently applied in this court. We are of the opinion that no valid contract was made on November 12, 1915, and the theory of the bill failed.

There seems to have been nothing in the pleadings or evidence that warranted the court in making the decree a lien upon the entire property of the Occidental Club. The decree below must be reversed, but the case will be remanded to the lower court to enable the plaintiffs to proceed, if they desire, for an accounting to wind up the copartnership that existed between Mrs. Lee and the defendant. The plaintiffs, as Mrs. Lee's sole heirs at law, have a right to such accounting. That court will be able to make any amendments of the bill of complaint that may be necessary for that purpose. The appellant will recover his costs to be taxed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, FELLOWS, and KUHN. JJ., concurred.

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WABASH RAILWAY CO. *v.* OTTGEN.

1. DRAINS—ESTABLISHMENT—CONCLUSIVENESS—FRAUD.
   The finding of special commissioners of the necessity of establishing a drain upon private property, and the compensation therefor, under section 4883, 1 Comp. Laws 1915, is final, in the absence of fraud.
2. SAME—INJUNCTION.
   Where, on appeal from a decree dismissing plaintiff's bill to enjoin the establishment of a drain along plaintiff's right of way, under section 4894, 1 Comp. Laws 1915, the evidence shows that a drain had previously been maintained on plaintiff's right of way, and to place it elsewhere would be more expensive, and there is no evidence of fraud, either actual or constructive, on the part of the special commissioners, the decree below will be affirmed.

Appeal from Lenawee; Hart, J. Submitted January 11, 1918. (Docket No. 54.) Decided March 27, 1918.

Bill by the Wabash Railway Company against Conrad Ottgen, drain commissioner of Lenawee county, to enjoin the construction of a drain. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Baldwin, Alexander & Russell, for plaintiff.

Leland F. Bean, for defendant.

STONE, J. This is an appeal from a decree in the circuit court for the county of Lenawee, in chancery, dismissing plaintiff's bill of complaint.

The proceedings which plaintiff seeks to enjoin contemplate the construction of a tile drain two and one-half feet below, and in the bottom of another county drain already established and existing on plaintiff's right of way. Upon a proper application, defendant determined that the proposed drain was nec-

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essary and practical, and in his order of determination set forth the route of the drain. The route as surveyed is upon the right of way of the plaintiff for a distance of about 875 feet as indicated by the accompanying plat, which was attached as exhibit "A" to the bill of complaint.

The plaintiff was requested to release the right of way for the drain as proposed, which it refused to do, whereupon special commissioners were appointed by the probate court to determine the necessity for said drain, and for the taking of private property for the use and benefit of the public for the purpose thereof, and to determine the just compensation to be made therefor, in accordance with the provisions of section 4883, 1 Comp. Laws 1915.

Special commissioners met and viewed the route of the drain, and more especially where it was upon plaintiff's right of way, and made a determination and finding that it was necessary to lay said drain upon the right of way of plaintiff, as proposed, for a distance of about 875 feet, and that it was necessary to take a strip of land 50 feet in width on each side of the line of the proposed drain for the purposes thereof, along the right of way of the plaintiff, and fixed the compensation to the plaintiff at the sum of one dollar; and that the drain was to be a tile drain on the right of way of the plaintiff, and an open drain from the point where it leaves the plaintiff's right of way at the westerly end.

The right of way of plaintiff, at the point where it is proposed to construct the tile drain in question, is 100 feet wide, and there are now upon it at this point the main and side tracks of the Detroit, Toledo & Ironton Railroad Company, in addition to plaintiff's main track, and its track connecting plaintiff's main track with the main track of the Detroit, Toledo & Ironton Railroad Company. There is at the present

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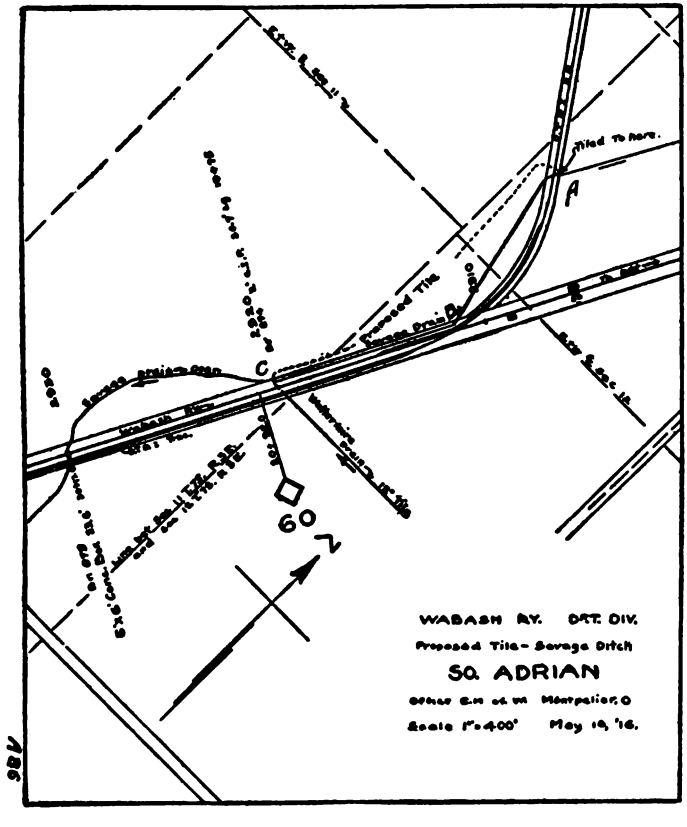
time an open ditch known as the "Savage drain," on plaintiff's right of way on the northerly and westerly side of its main and connecting tracks, and the northerly or westerly slope of the track embankment makes the southerly or easterly slope of said ditch, the right of way of which open drain has heretofore been secured from the plaintiff. The drain as proposed on plaintiff's right of way follows the course of the pres-



ent open ditch, and it is proposed to lower the grade of the present ditch about 2½ feet and put in tile.

The land lying north and west of plaintiff's right

of way is farm land, owned by private parties, and on a straight line between point marked "A" and point marked "C" on exhibit "A"; it is practically of the same level as the natural level of the lands on plaintiff's right of way, where the tile drain is proposed to be located. There is a tile drain ending at point "A"; also a tile drain known as the "Waltermire drain," which passes under the plaintiff's tracks and has its outlet near the point marked "C," and empties into the present open drain.

By the bill of complaint, the regularity of the proceedings is not questioned; and the sole ground for relief is alleged to be that the special commissioners acted fraudulently in determining that it was necessary to take plaintiff's right of way for the purpose of the drain, and in not finding that the same could equally well be laid upon private lands.

The defendant by his answer denied all fraudulent and illegal action charged in the bill, and stated that there is at present, along the right of way of said railroad, on the line of said proposed drain, an open ditch, heretofore established as a county drain, and that said ditch is approximately 15 feet in width at the top, and between five and seven feet deep, varying in places, according to the bank; that the specifications of said proposed drain on plaintiff's right of way, require a tile drain to be placed in the bottom of said open drain already existing, and that excavating in the bottom of said existing drain will not exceed 2½ feet, and only so much as is necessary to lay the tile required by said specifications, the same being 20-inch tile.

At the hearing it was claimed by the plaintiff that the construction of the drain upon its right of way would injure it for railroad purposes, and that it could equally well be laid upon private lands, and there was testimony tending to support said claim; and it

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is urged that these facts must have been apparent to the commissioners when they viewed the premises, and that it was the duty of the commissioners to so find, and that their action in not so finding constituted fraud.

The statute relied upon by the plaintiff is section 4894, 1 Comp. Laws 1915, which provides:

"Drains may be laid along the line of any railroad within its right of way: *Provided,* Such drain shall not be to the injury of the road bed. Whenever it is proposed to construct a drain along the line, and within the right of way of any railroad, and the company owning or operating such road shall refuse or neglect to permit such drain to be constructed, or release the right of way therefor within the time prescribed in section four of chapter three, such release shall be obtained in the same manner as is provided in this act for obtaining private lands: *Provided,* That no drain shall be constructed along the line of any railroad without the consent of the company owning or operating such road, if it shall appear to the special commissioners or jury that such drain can equally well be laid on private lands."

An examination of the evidence shows that there was no insuperable reason why the drain could not have been constructed upon private lands. There was evidence tending to show that such construction would have been more expensive. It is conceded that the decision of the commissioners, in the absence of fraud, is final.

It is claimed by plaintiff that the case is ruled by the recent case of *Toledo, etc., R. Co.* v. *Shafer,* 190 Mich. 89. That case was before us upon demurrer to the bill, and we held that the bill stated a case for equitable relief. Justice KUHN, the writer of the opinion, said:

"Proper proceedings were taken to lay out the drain in question, as provided for by the drain law, and no appeal was taken as provided therein, and no attempt

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was made to review the proceedings by the writ of certiorari. An examination of the drain law clearly discloses that it was the intention of the legislature to have all matters pertaining to the locating and constructing of a drain, in the absence of fraud, tried out, determined, and forever settled in the direct proceedings to establish the drain, or on certiorari, as provided for in the statute;" and many of our cases were cited.

The same doctrine was stated by us in *Troost* v. *Fellows*, 169 Mich. 66, at page 70. The legislature had the undoubted power to commit to these statutory officers the determination of the question whether "such drain can equally well be laid on private lands"; and it is well settled that the decisions of such officers within their jurisdiction are not open to collateral attack, and if not corrected by some of the modes pointed out by the statute, they are conclusive, in the absence of fraud.

In our opinion the sole question here presented is whether or not there was fraud, either actual or constructive, on the part of the special commissioners. We are unable to point out any fraud in this record. We think that the commissioners had the right to consider the matter of expense of construction, and of existing conditions, in reaching their determination. The following facts appeared upon the hearing, and they no doubt influenced the learned circuit judge in refusing relief:

"*The Court:* This old drain which is known as the 'Savage drain,' the open ditch, that right of way has once been secured from the Wabash?

"*A.* Yes, sir.

"*The Court:* Now this right of way you condemned, is taking 2½ feet deeper than the old right of way, and does it take any wider?

"*A.* It doesn't take as wide."

These facts were known to the commissioners, and we think that they had the right to consider them.

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It also appeared that if the new ditch were dug as asked for by plaintiff the Waltermire tile drain would have to be extended about ten rods.

Unless, because the determination of the special commissioners did not accord with the claim of the plaintiff, it must be held that they acted fraudulently, the decree dismissing the bill should be affirmed. The circuit judge, after hearing the evidence, reached the following conclusion:

"I think that if this was a new drain here to be constructed with a new situation here, and there were no other drains around here, that this bill would lie under this statute; but I think, that under the particular facts here, as shown, that the court cannot find that there was any fraud on the part of the commissioners. I think I will have to dismiss the bill."

We agree with that conclusion.

The decree below is affirmed, with costs to the appellee.

OSTRANDER, C. J., and MOORE, STEERE, BROOKE, FELLOWS, and KUHN, JJ., concurred. BIRD, J., did not sit.

YERKES v. ANTRIM CIRCUIT JUDGE.

1. MANDAMUS—PRACTICE—PLEADING—RETURN—CONCLUSIVENESS.
   Where no plea has been filed to the answer and return in mandamus proceedings, according to well settled practice and under section 4, chap. 36 of the judicature act (3 Comp. Laws 1915, § 13440), all material facts stated in said return must be taken to be admitted as true.

2. EXCEPTIONS, BILL OF—PRACTICE—JURISDICTION.
   An order of the Supreme Court extending the return day of

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the writ of error, is no authority for the circuit judge to disregard the correct practice pursuant to section 62, chap. 18, of the judicature act (3 Comp. Laws 1915, § 12634), and Circuit Court Rule No. 66, in settling a bill of exceptions after expiration of the time limited in the statute.

3. SAME—TIME FOR SETTLING—DISCRETION—JURISDICTION—STATUTES—COURT RULES.

Where the practice as prescribed in section 62, chap. 18, of the judicature act, and Circuit Court Rule No. 66, has not been followed, the circuit judge is without jurisdiction to settle a bill of exceptions, after expiration of the time limited in the statute, since he may exercise discretion only within the statutory limitations.

4. JUDGMENT—NON OBSTANTE VEREDICTO—MOTIONS.

Where judgment had already been entered, a motion to enter judgment *non obstante veredicto* was unavailing. *Wulff* v. *Bossler*, 199 Mich. 70.

5. EXCEPTIONS, BILL OF—TIME FOR SETTLING—MOTION FOR NEW TRIAL—EXTENSION OF TIME.

A motion to enter judgment *non obstante veredicto*, if treated as a motion for a new trial, must conform to the practice prescribed in the statute (section 62, chap. 18) and Circuit Court Rule No. 48, in order to entitle plaintiff to extension of time to settle a bill of exceptions.

6. SAME — EXTENSION OF TIME — PRACTICE — STATUTES — COURT RULES.

Because a writ of error may issue any time within one year after the entry of judgment, it does not follow that a bill of exceptions can likewise be settled as a matter of right within that time, unless the statute and rules providing for extending the time for settling such bill shall have been complied with. 3 Comp. Laws 1915, § 12634; Circuit Court Rule No. 66.

Mandamus by Lewis N. Yerkes to compel Frederick W. Mayne, circuit judge of Antrim county, to sign and settle a bill of exceptions. Submitted January 29, 1918. (Calendar No. 28,143.) Writ denied March 27, 1918.

Malcolm C. Yerkes, for plaintiff.

Clink & Williams and *Ivin E. Kerr*, for defendant.

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STONE, J. Upon petition of plaintiff, on September 28, 1917, an order was made by this court directing the respondent circuit judge to settle and sign plaintiff's bill of exceptions in a case then pending before him in the circuit court for the county of Antrim, wherein Lewis N. Yerkes was plaintiff, and Inez Leszynski and Ira A. Adams, administrator of the estate of Edward G. Leszynski, deceased, were defendants; and further, that he set aside his order of July 29, 1917, and enter an order granting plaintiff's motion, *or* that he show cause why a peremptory mandamus should not issue to compel him to sign and settle the said bill of exceptions.

The respondent has made answer and return to said petition and order. No plea has been filed to said return. Not only is the practice well settled that where no issue is joined in such proceedings, the answer of respondent is conclusive as to the facts, but section 4 of chapter 36 of the judicature act (3 Comp. Laws 1915, § 13440) provides:

"That all material facts stated in said return that are not specifically denied by plea, shall be taken as admitted to be true."

The following chronological history of the various steps taken in said case is submitted by the respondent in his return:

"July 1, 1915, suit commenced.

"December 1-4, 1915, trial at Bellaire, resulting in a verdict of $3,000 against defendant Adams, and of no cause of action as to the defendant Inez Leszynski.

"December 4, 1915, motion for directed verdict made by defendant Adams on the grounds that the circuit court had no jurisdiction, but the probate court had original, exclusive jurisdiction; motion denied.

"December 4, 1915, request to charge that the circuit court had no jurisdiction, and the probate court had original, exclusive jurisdiction and to render verdict of no cause of action as to defendant Adams; submitted and refused.

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"December 4, 1915, judgment entered.

"January 12, 1916, motion by defendant Adams to vacate judgment as to him filed.

"July 27, 1916, above motion granted.

"September 16, 1916, plaintiff filed motion to set aside verdict as to Inez Leszynski, and enter judgment, notwithstanding the verdict.

"October 9, 1916, hearing on above motion held in open court.

"December 5, 1916, plaintiff filed notice to settle proposed bill of exceptions at Detroit, December 16, 1916.

"December 8, 1916, plaintiff, without countermanding above notice, noticed settlement of a proposed bill of exceptions at Traverse City for December 18, 1916.

"December 13, 1916, plaintiff filed motion to extend time within which to settle bill of exceptions to December 23, 1916, and noticed hearing at Traverse City, December 18, 1916.

"December 19, 1916, hearing in open court on both of last above motions. Bill of exceptions withdrawn by plaintiff's attorney; motion to extend time within which to settle proposed bill of exceptions denied.

"January 3, 1917, plaintiff filed *ex parte* amendment to motion of September 16, 1916, adding thereto 'and a new trial granted.'

"February 28, 1917, plaintiff's motion to set aside verdict as to Inez Leszynski and enter judgment notwithstanding verdict, denied.

"February 28, 1917, order denying last above motion filed.

"March 3, 1917, notice to settle bill of exceptions at Traverse City on March 9, 1917, filed by plaintiff.

"March 9, 1917, hearing had in open court on above motion; taken under advisement by me.

"March 19, 1917, order entered by me refusing to sign and settle plaintiff's proposed bill of exceptions.

"April 9, 1917, petition for an order to show cause why mandamus should not issue to compel me to set aside my order of March 19th and settle bill of exceptions filed in Supreme Court by plaintiff.

"April 19, 1917, application for mandamus denied by Supreme Court.

"June 13, 1917, plaintiff noticed settlement of bill of exceptions at Detroit, June 20, 1917.

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"June 23, 1917, settlement of bill of exceptions denied on hearing in open court.

"June 28, 1917, plaintiff filed motion to vacate above order; denied.

"July 3, 1917, plaintiff noticed settlement of bill of exceptions at Bellaire, Michigan, July 11, 1917.

"July 11, 1917, defendants' attorneys appeared; plaintiff did not appear; I was not present because I knew nothing about it.

"July 12, 1917, plaintiff noticed settlement of proposed bill of exceptions at Charlevoix, Michigan, July 20, 1917.

"July 20, 1917, hearing on said notice in open court with all parties represented.

"July 20, 1917, order entered by me denying above motion.

"July 20, 1917, plaintiff moved to set aside above order; denied."

The answer of respondent also contains the following:

"Answering paragraph 21, respondent shows that on July 20, 1917, settlement of a proposed bill of exceptions came on for hearing; that the attorneys for both defendants made and filed written objections thereto, copies of which are hereto attached and marked exhibits 16 and 17. Among the objections urged was the one that no extension of time in which to settle a bill of exceptions had ever been granted and none asked for, except the one in December, 1916, which was then denied, and that the time for settling a bill of exceptions had expired. This cause was tried in the Antrim county circuit court at Bellaire, Michigan, on December 1-4, 1915. On July 27, 1916, an order was made by me setting aside the verdict and judgment against defendant Adams. Since that time I have had four regular terms and three special terms of court at Bellaire, at all of which I was present and presided and attended to the business of the court, on to-wit, August 14 and 15, 1916; September 14, 1916; October 9, 10, 11, 12 and 13, 1916. February 26, 27 and 28, 1917; March 19, 1917; May 7, 1917, and July 16, 1917, and no application or motion for an extension of time in which to settle a bill of exceptions was filed in said

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cause or made and presented to me, and no order was made extending the time in which to settle the same. That I thereupon, on July 20th, entered an order denying plaintiff's application and refusing to settle and sign plaintiff's bill of exceptions for the reason, among others, that, 'upon the record and under the rules and practice provided by the court rules and statutes, this court is without authority to settle the proposed bill of exceptions at this time. The decision of the motion in this case presents no opportunity for the exercise of judicial discretion.' * * *

"Answering paragraph 24, respondent shows that on the hearing of said motion, I was of the opinion that I had no discretionary right or power in this matter; that I was precluded by the statute and decisions and the rules and practice of this Honorable Court from settling said bill of exceptions, and for this reason said motion was denied. That the reasons given by the Honorable Supreme Court in previous decisions denying the right to settle a bill of exceptions, apply with special force to the instant case."

It further appears that on May 3, 1917, plaintiff filed in this court a motion to extend the time for settling his proposed bill of exceptions based upon certain affidavits filed in said cause. Counsel for defendants filed objections thereto, and on June 6, 1917, this court denied the petition and motion, but ordered that the return day of the writ of error theretofore issued in said cause, be extended to the 27th day of July, 1917.

Plaintiff, in his brief, in what he terms his assignments of error, urges that the orders of June 23, 1917, and July 20, 1917, should be vacated and set aside; and that the Antrim circuit judge disregarded the order of this court of June 6, 1917, extending the return day of the writ of error; and that the circuit judge erred in holding that he had no authority or jurisdiction to settle plaintiff's bill of exceptions.

In our opinion the attorney for plaintiff has misapprehended the correct practice in settling a bill of

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exceptions, as the same has recently been stated in the case of *Boyne City Hardware Co.* v. *Charlevoix Circuit Judge,* 197 Mich. 374. It is one thing under the practice to obtain an order extending the time for a return of a writ of error, and quite another thing to make application upon proper showing to the circuit judge for an extension of time in which to settle a bill of exceptions. We need only refer to section 62 of chapter 18 of the judicature act (3 Comp. Laws 1915, § 12634) and Circuit Court Rule No. 66, to show what the correct practice now is.

In the case above cited Justice BROOKE, in a unanimous opinion, said:

"It is quite clear that the discretion of the circuit judge may be exercised only within the limits fixed by the statute and the rule. * * * The purpose of the statutory provision under consideration is to hasten, so far as possible, the final determination of the litigated question. Parties desiring to review judgment must act seasonably, and the court may exercise discretion only within the statutory limitations."

See, also, *Lake Shore, etc., R. Co.* v. *Branch Circuit Judge,* 116 Mich. 399.

As already appears, the judgment in said case was entered on December 4, 1915, in favor of the plaintiff, and against the defendant Adams, as administrator; and of no cause of action as to the defendant Inez Leszynski, which judgment as to defendant Adams, only, was set aside by the order of July 27, 1916. No stay of proceedings was asked by or granted the plaintiff in which to move for a new trial or settle a bill of exceptions. No further steps were taken by plaintiff until some 50 days after the order of July 27, 1916, setting aside the judgment as to defendant Adams, then a motion was made by plaintiff, addressed to the attorneys for the defendant Inez Leszynski, to set aside the verdict of no cause of action as to defendant

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Inez Leszynski, and enter judgment for the plaintiff notwithstanding the verdict. The motion was, by *ex parte* amendment, sought to be changed into a motion for a new trial, some five months after the order of July 27, 1916. The record shows, also, that after the final order of July 27, 1916, and between that time and the time the plaintiff made the motion of September 16, 1916, a regular term of court was held in the county of Antrim on August 14 and 15, 1916, and that there was a session of said court on September 14, 1916, at which the respondent circuit judge was present and presiding. It also appears that between September 16, 1916, and the day of filing the amendment to said motion, a regular term of court was held in Antrim county on October 9, 10, 11, 12 and 13, 1916, at which the respondent was present and presiding.

It may not be important to here determine whether the motion made by plaintiff's attorney was a motion simply to enter judgment notwithstanding the verdict, or for a new trial. It appearing that judgment had already been entered upon the verdict, under the authority of *Wulff* v. *Bossler*, 199 Mich. 70, the motion to enter judgment for the plaintiff notwithstanding the verdict, was unavailing. Treating the motion as one for a new trial, the practice was irregular under the statute cited and Circuit Court Rule No. 48. No steps were taken by the plaintiff towards settling a bill of exceptions until December 5, 1916, when he noticed a settlement of a proposed bill of exceptions at Detroit, on December 16, 1916. On December 8, 1916, without countermanding that notice, he again noticed a settlement of the proposed bill of exceptions at Traverse City on December 18, 1916. On December 13, 1916, he filed a notice for hearing a motion to extend the time within which to settle a bill of exceptions to December 23, 1916, and noticed

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the same for hearing at Traverse City on December 18, 1916. It appears, by respondent's answer, that on December 19, 1916, said hearing was had; the proposed bill of exceptions was withdrawn from the consideration of the court by the plaintiff; the motion to extend the time within which to settle the bill of exceptions was then denied. On February 28, 1917, an order was made denying plaintiff's motion to set aside the verdict as to defendant Inez Leszynski and enter judgment notwithstanding the verdict. On March 3, 1917, plaintiff noticed another proposed bill of exceptions for settlement at Traverse City on March 9, 1917, at which time a hearing was had; the parties were represented, and objections interposed by counsel for defendants upon the grounds, among others, that no extension of time had been granted within which to settle a bill of exceptions; that no motion for a new trial had been made within the time allowed by rule or statute, or leave of court; and that the court was without jurisdiction to settle a bill of exceptions at that time; also that a complete transcript of the testimony had not been furnished as provided by law. An order was entered on March 19, 1917, denying the right of plaintiff to settle a bill of exceptions. Application was then made to this court for an order to show cause why the order of March 19th should not be set aside, and the bill of exceptions settled, which was denied by this court on April 19, 1917. Later, the plaintiff moved this court for an order extending the time within which to settle the bill of exceptions, which was denied June 6, 1917.

It is probably unnecessary to repeat all these various steps, but it should be noted that during all this time, and down to July 20, 1917, no order had been made or entered extending the time within which to settle a bill of exceptions; and that the only application for such order was made December 13, 1916, to

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extend the time to December 23, 1916, and was denied by the circuit judge, and no stipulation or waiver of their rights has been made, entered into, or signed by the attorneys for the defendants.

It seems to us very clear that, inasmuch as it was one year, lacking seven days, between what is termed the final order of July 27, 1916, and July 20, 1917, the date on which the proposed bill of exceptions in question was noticed for settlement, and that during that period no extension of time was granted within which to settle a bill of exceptions, and no cause was shown by affidavit, or any special motion made by plaintiff for, or written stipulation of the parties made or filed, extending such time, and the time allowed by statute and rules of court within which plaintiff could settle a bill of exceptions having been allowed to expire by him, without taking any steps to extend the same, the respondent was without jurisdiction on July 20, 1917, to settle the proposed bill of exceptions.

Were it to be held that the time to settle a bill of exceptions commenced to run from February 28, 1917, the date of the denial of plaintiff's motion, it was 142 days from that date to July 20, 1917, during which time no special motion was made to, or order granted by, respondent, or stipulation signed by the parties, extending the time in which to settle a bill of exceptions; the time allowed plaintiff by the rules and statute had expired, and respondent was without authority to settle the bill of exceptions. Unless we are to abrogate the statute and rules, and reverse our previous holdings, the plaintiff has no standing in his present application, and the writ of mandamus should be denied.

We have examined with care the authorities cited by counsel for the plaintiff, and are of the opinion that they are not applicable to the question here involved. They relate mainly to writs of error and

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chancery appeals under former statutes and rules. Because a writ of error may issue any time within one year after the entry of judgment, it does not follow that a bill of exceptions can likewise be settled as a matter of right within that time, unless the statute and rules providing for extending the time for settling such bill have been complied with.

The writ of mandamus will be denied, with costs against the plaintiff.

BIRD, MOORE, STEERE, BROOKE, and FELLOWS, JJ., concurred. OSTRANDER, C. J., and KUHN, J., did not sit.

KUNZE *v.* JONES.

1. CONTRACTS—BUILDING CONTRACT—ARCHITECT'S REFUSAL TO ISSUE CERTIFICATE—BREACH OF CONTRACT.

   In proceedings by a contractor to enforce a mechanic's lien, where the evidence shows that there was no reasonably unsatisfactory work performed by the contractor, *held*, that the architect's refusal to issue certificate for payment for work done, in accordance with the terms of the contract, was captious, unreasonable, and arbitrary, justifying plaintiff in quitting the job.

2. SAME—PERFORMANCE—REJECTION—ESTOPPEL.

   An owner, or architect, as agent of the owner, may not stand by day after day, and see the work on a building go on without objection, and then, after the work is completed, reject it as unsatisfactory.

3. MECHANIC'S LIENS—OVERSTATEMENT OF CLAIM—VALIDITY.

   A contractor may include in his claim of lien on a building the amount due from him for materials furnished, and it

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is not invalidated because another contractor, who succeeded him on the job, without notice to plaintiff, paid for same.

Appeal from Wayne; Hally, J. Submitted February 1, 1918. (Docket No. 172.) Decided March 27, 1918.

Bill by Arthur E. Kunze against Mary E. Jones to foreclose a mechanic's lien. From a decree dismissing the bill, plaintiff appeals. Reversed, and decree entered for plaintiff.

Earl I. Heenan, for plaintiff.

Geer, Williams & Martin, for defendant.

STONE, J. Appeal from decree dismissing bill of complaint. The plaintiff filed his bill of complaint to foreclose a mechanic's lien which he had filed against the lands and building of defendants. By the contract, which was made in writing on October 3, 1913, between plaintiff, as contractor, and F. P. Jones and Mary E. Jones, his wife, as owners, plaintiff was to do, to the satisfaction of the defendants' architect, acting as the agent of the defendants, all the labor and furnish the material for the concrete work, brick work, iron work, and furnish the material and construct tile drains and inside sewers, and perform the labor of setting all the stone work for a certain building then and there about to be erected by the said F. P. Jones and Mary E. Jones on certain described land in the village of Highland Park, in consideration of the sum of $1,425 to be paid by the said defendants, who were the owners of said premises as tenants by the entireties. F. P. Jones died pending the case, and the title to the property has vested in Mary E. Jones as survivor.

By the terms of the contract, the plaintiff, as such

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contractor, was to proceed in a prompt and diligent manner and wholly finish the said work, but the time limit in which the contract was to be completed was left blank.

The 10th clause of said contract was as follows:

"Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements on his part herein contained, such refusal, neglect or failure being certified by the architect, the owners shall be at liberty, after three days' written notice to the contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the owners shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession of all materials thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor, he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under the contract shall exceed the expense incurred by the owners in finishing the work, such excess shall be paid by the owners to the contractor, but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owners. The expense incurred by the owners as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architect whose certificate thereof shall be conclusive upon the parties."

The 13th clause was as follows:

"And it is hereby mutually agreed between the parties hereto that the sum to be paid by the owners to

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the contractor for said work and materials shall be Fourteen Hundred and Twenty-five ($1,425.00) subject to additions or deductions on account of alterations as hereinbefore provided, and that such sum shall be paid in current funds by the owners to the contractor in installments, as work progresses, on certification from the architects, reserving 15 per cent. until the building is entirely completed. It being understood that the final payment shall be made within 60 days after this contract is completely finished."

The plaintiff started the work on or about October 6, 1913, and had made such progress that on or about October 16th the architect gave him a certificate for $500, the work having been performed in a manner reasonably satisfactory to the architect up to that date.

This amount was paid to the plaintiff by the owners. Plaintiff started veneering above the foundation, and continued to have work done on the building intermittently until November 22d.

Plaintiff claimed that some of the delays were caused by the carpenters, over whom he had no control; that some delays occurred on account of his workmen not working steadily.

The plaintiff testified that he saw the architect on the job frequently, and that he never complained of the plaintiff's work being unsatisfactory until plaintiff asked him for a second certificate.

Upon the hearing, there was a sharp conflict in the testimony as to the progress of the work at this time. The plaintiff testified:

"After the first payment of $500 was made to me I veneered the two sides of the building, and practically all the rear, and a good third of the front with pressed brick. I put in porches and studdings for all stone steps."

It was the further claim of the plaintiff that just prior to November 28th he called at the architect's

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office several times to get a certificate for more money, but could not find the architect there, so he wrote him a letter requesting a certificate for payment.

Plaintiff finally had a conversation with the architect in which the latter stated to him that the work which he had done was unsatisfactory, and the architect refused to give the certificate requested by the plaintiff; that plaintiff then asked the architect to point out to him what part of the work was unsatisfactory, and also told the architect that if there were any unsatisfactory things he would be glad to remedy them.

The plaintiff further testified that after going to the architect's office several times more, and not finding him in, he left at the office the following paper to be signed by the architect:

"DETROIT, MICH., Nov. 28, 1913.

"A. E. KUNZE:

"I hereby agree to accept brick work that is done on 2-family flat building located on Cortland Ave. being built for F. P. Jones to date. Except."

But as claimed by the plaintiff, the architect never pointed out to him what part of the work was wrong or unsatisfactory and in fact refused to do so; that at the time of the plaintiff's request for this second certificate he had become liable for, and had expended for labor and materials the sum of $1,244.39; that plaintiff had actually paid out all of this amount, except $340.39; that he had received $500; so that there was at this time actually due plaintiff $744.38, less the amount which he owed for materials, which was $340.39, or a net amount due plaintiff of $403.99; that the building at this time was substantially completed, the work above described having been done.

The plaintiff further claims that to finish the work at that time the labor would not amount to more than $75; that there were enough of the common brick on

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the ground to complete the building; but that a few more pressed brick would be needed.

At this time plaintiff mailed a letter requesting a payment of $650. The architect replied as follows:

"DETROIT, MICH., Mon., Dec. 1st.

"A. E. KUNZE,

"*Dear Sir:* In regard to your communication of Nov. 28th, I will not give estimate for $650, or any part of it, nor will I accept brick work, that is far from being satisfactory, I might say rotten, and furthermore, I will say that unless you show your willingness to proceed with the work within 48 hours from receipt of this letter, I will use other means to finish the work. Yours truly,

"ULYSSES E. CLOUTIER."

To which the plaintiff replied as follows:

"DETROIT, MICH., Dec. 3, 1913.

"MR. ULYSSES E. CLOUTIER,

"*Dear Sir:* In regard to your communication of Dec. 1st, I refuse to go ahead with said work, unless you make the payment as I demanded, or according to contract. If not I must find some other way for collecting them, by way of liens, for people that have furnished material there, and myself also.

"I remain,

"A. E. KUNZE."

Plaintiff claims that the architect did not point out to him the parts of the work which the architect considered unsatisfactory, and did not make the payment requested, or any part of it, and that the plaintiff then left the work.

On December 4, 1913, the architect let the balance of the work to Axel Carlson, who was a carpenter contractor, and who had the carpenter work on the job. Carlson began work on or about December 4th. There was no advertising for bids, but the architect simply gave Carlson a contract to complete the job for the difference between the original price with plaintiff ($1,425) and the amount plaintiff had re-

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ceived ($500), or $925. The $340.39 owing by plaintiff for material was paid by Carlson, and he received $150 for his services. This second contractor finished the work without making any changes in that which had been done by the plaintiff, and of which the architect had complained. There was other testimony corroborative of that of the plaintiff both as to the character and progress of the work at the time the plaintiff left the job.

On behalf of the defendant it was claimed, and the architect testified that under the plaintiff's contract the work dragged and that for "three weeks at a stretch" plaintiff had no men on the job; that if everything had gone smoothly the entire job ought to have been completed in 30 days; that after the work was finished up to about the first floor joists, that part of the work having been performed in a manner reasonably satisfactory to the architect, plaintiff was given a certificate for $500, which was paid; that after this payment the work done was unsatisfactory to the architect. On cross-examination the architect testified as follows:

"I don't just remember when I first told Mr. Kunze that the work was unsatisfactory. It was shortly before I wrote him that letter on December 1st; about a week or so, may be a few days, for all that I can remember. I saw Mr. Kunze at the office. I told him in my own office. I never told him on the job. I should judge Mr. Kunze had been on the job about two or three weeks when I told him this.

"*Q.* That was the first time that you told him that, that work was unsatisfactory to you?

"*A.* No, I told him that before he quit, but after he quit I did not see him very often.

"*Q.* When did you tell him?

"*A.* I told him on the job, before the work was stopped. Just shortly after the work was stopped. I told him in what respects the work was unsatisfactory. He didn't say much. He said he would fix it,

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but he never did anything with it. He didn't start to fix it. He didn't ask me to point out where it was wrong. I pointed it out to him myself."

Witness had before testified that the plaintiff's work was unsatisfactory to him, in that the joints in the veneering were all uneven, crooked and all thicknesses. The following appears in his cross-examination:

"*Q.* Was any of the work that was done by Mr. Kunze torn out? Did you tear that work down that was crooked, or not.

"*A.* No, I did not. They are there yet. I terminated Mr. Kunze's contract on account of his refusal to go ahead with the work."

It is apparent that the controlling question in the case is, Who first broke the contract? It is the claim of the plaintiff that the architect, by his unreasonable, and captious conduct, compelled the plaintiff to abandon the contract; and that the plaintiff was not in default either in the progress or character of the work done by him, and section 14808, 3 Comp. Laws 1915, is relied upon. It reads:

"When the owner, part owner or lessee, shall have failed to perform his part of the contract, and by reason thereof the other party shall, without his default, have been prevented from completely performing his part, he shall be entitled to a reasonable compensation for as much thereof as he has performed, in proportion to the price stipulated for the whole, and the court shall adjust his claim accordingly."

We have carefully read the testimony, and are of the opinion that there was no reasonably unsatisfactory work performed by the plaintiff; that the work that he had done was reasonably good work. The architect testified:

"About all the trouble with the veneering that I could see was that the veneering was not straight, and the joints were not straight. There was no other trouble with the veneering,"

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and no change was made in that work when the new contractor took hold of the work. Furthermore, an experienced bricklayer, apparently a disinterested witness, afterwards examined the work to determine the character of the brick work, and he testified: "I consider the brick work a very good job, as the run of work runs."

We think that the plaintiff is correct in the claim that at no time during the period between the first payment, and the request for a second payment, was the plaintiff directly or indirectly, by intimation or otherwise, informed or led to believe by the architect that the work which he had done, and was doing, was unsatisfactory. By the terms of the contract payments were to be made in installments as the work progressed, on certificates of the architect.

After the plaintiff had received $500, and after an interim of about 37 days, and after, as he claims, he had invested $1,244.39 in labor and material for defendant's building, he asked for the sum of $650, or if not this amount then "according to the contract." He was refused that sum "or any part of it."

It seems to us that at the time of this request plaintiff was reasonably entitled to a payment under the contract, of at least some sum approximating the amount requested. The architect was frequently on the job.

As was said by this court in *Schliess* v. *City of Grand Rapids*, 131 Mich. 52, 62, the law would not permit defendant or the architect, her agent,

> "To see the work go on, to ratify it day by day and week after week * * * and then say, when the work is done, 'you have not complied with the contract.' The time to accept or reject was when the work was being done. It could not lull the plaintiff into the belief that this work was satisfactory, and, when completed, reject it."

The learned trial judge dismissed the plaintiff's bill

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of complaint, among other things, for the reason that by the terms of the contract the plaintiff subjected

"Himself to the conclusions of the architect respecting the character of the work, but was subjecting himself to the conclusions of the architect in the case that the architect determined to put him off the job. * * * Now I do know that in some instances the courts have pointed out that an unreasonable demand must not be insisted upon by the architect, under these circumstances, and if an unreasonable demand is insisted upon by the architect, under these circumstances the court of equity has jurisdiction to set aside his unreasonable demands and do justice between the parties. That is, I think, the doctrine that is laid down in *Gier* v. *Daiber*, 148 Mich 190. * * * I personally am obligated to follow that, and I am going to follow that so far as the demands of the architect are concerned, but there is another part of the contract here, which portion of the contract, and the action of the architect under it, has not been met with any sufficient testimony; any testimony that to me would satisfy me that a conclusion different from the one that I have reached should be reached. In the event of the abandonment of the work, or in the event of the contractor being put off the work, it is up to somebody to complete the work, and on the completion of the work the architect has to certify and audit the account. In this case the architect has certified and audited to the owners the account of this second contractor to the extent of $936.15. He has in like manner sworn that it was necessary to use that sum of money to complete the work, and buy the material and pay for the material that had been left unpaid for, by the other contractor."

The chancellor held that the testimony of the architect had not been met by the plaintiff. It should be borne in mind that the architect testified: "I terminated Mr. Kunze's contract on account of his refusal to go ahead with the work." So the question recurs, Was the plaintiff justified in quitting the job? If he was justified in his claim that, under the contract, he was entitled to a certificate from the architect for an installment of payment, in the progress of the work.

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and was captiously, unreasonably and arbitrarily refused such certificate by the architect, and this was the reason for quitting, then plaintiff has brought himself under the provisions of the section of the statute above quoted, and is entitled to relief, without reference to what was subsequently done by the architect and the defendant. In our opinion the plaintiff has sustained the burden of proof on this branch of the case by a clear preponderance of the evidence.

It is stated by counsel for defendant that plaintiff in his claimed lien made an overstatement of claim. We think that the claim was authorized under the holding of this court in *Halpin* v. *Garman*, 192 Mich. 71. The contractor, for his own protection, had the right to include in the amount he claimed, the amounts due from him for materials furnished. At the time of the filing of the statement of account and lien, plaintiff had not paid, nor was there evidence that he had notice that the outstanding bills had been paid by the defendants.

We think that the plaintiff is entitled to a decree, as prayed for, in the sum of $403.99 as of December 1, 1913, with interest and costs to be taxed; and that the decree below should be reversed, and a decree entered in this court accordingly.

BIRD, MOORE, STEERE, BROOKE, and FELLOWS, JJ., concurred. OSTRANDER, C. J., and KUHN, J., did not sit.

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In re HOFFMAN'S ESTATE.

FOOTE *v.* HOFFMAN.

1. EXECUTORS AND ADMINISTRATORS—SERVICES—PARENT AND CHILD—PRESUMPTIONS.

The presumption that services rendered to a mother by a daughter are gratuitous is not of itself destroyed by the fact that they were not members of the same household, yet this fact weakens the presumption, and it may be regarded as giving support to other facts tending to establish an implied contract.

2. SAME—IMPLIED CONTRACT—QUESTION FOR JURY.

Evidence that plaintiff, a married woman living in her own home in the same city as her father and mother, in response to her mother's request, gave up her own home to care for her mother, who promised her, in her father's presence, that she should never regret it, presented a question for the jury as to whether there was an implied promise to pay for the services so rendered.

Error to Kalamazoo; Sharpe, J., presiding. Submitted January 31, 1918. (Docket No. 37.) Decided March 27, 1918.

Sarah H. Foote presented a claim against the estate of John A. Hoffman, deceased, for services rendered. The claim was disallowed by the commissioners and claimant appealed to the circuit court. Judgment for claimant. Hugh G. Hoffman, executor, brings error. Affirmed.

Harry C. Howard, for appellant.

Alfred S. Frost (*Prentis & Mulford,* of counsel), for appellee.

STONE, J. This litigation grows out of a claim presented to the commissioners on claims in the estate of John A. Hoffman, deceased, in the probate court for

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the county of Kalamazoo. The claim was disallowed by the commissioners, and an appeal was taken to the circuit court by the claimant, who is the daughter of John A. Hoffman and Lizzie R. Hoffman, both deceased. The claim was for personal services rendered to the said wife of Mr. Hoffman during her last illness and the care of the Hoffman household, as well as for services rendered to said John A. Hoffman after Mrs. Hoffman's death.

In the circuit court the claims, as finally submitted to the jury, were as follows:

(1) Services as nurse in caring for Lizzie R. Hoffman, wife of John A. Hoffman, and as housekeeper for John A. and Lizzie R. Hoffman from January 7, 1911, to February 26, 1912, date of her death, 59 weeks at $25 per week..... $1,475

(2) To services as housekeeper for John A. Hoffman from February 27, 1912, to May 4, 1914, 113 weeks at $10.00 per week..... 1,130

(3) To services as nurse in the care of John A. Hoffman, and as housekeeper from May 4, 1914 (when confined to his bed), to October 23, 1914, date of his death, 25 weeks at $25.00 per week.. 625

The jury found in favor of the claimant upon the first claim, including interest from March 14, 1916, in the amount of $590.

They allowed nothing upon the second claim. Upon the third claim they allowed for 25 weeks at $10 per week, $250. It may as well be stated here that the allowance on this last claim of $250 was set aside by the trial court, and judgment was finally entered for the claimant for $590 only, upon the first claim.

A motion to direct a verdict in behalf of the executor was made, but the decision thereon was reserved under the provisions of Act No. 217, Pub. Acts of 1915 (3 Comp. Laws 1915, § 14568 *et seq.*), and was treated as a motion to enter judgment notwithstanding the verdict of the jury. From the said judgment the executor has brought the case into this court by writ of

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error, and the only assignment of error which was argued in this court was, that under the evidence there could be no recovery, and a reversal is asked on that ground only; it being conceded by the appellant that if the claimant, on the proofs, as matter of law is entitled to recover, the judgment is a satisfactory one and the executor does not care to have it disturbed.

The evidence discloses that John A. Hoffman was the steward at the Kalamazoo State Hospital until, or nearly until, the time of his death. At the time of the transaction here involved his family consisted of himself and wife. He had two adult children, the elder, Mrs. Foote, claimant here, residing with her husband, George E. Foote, in the city of Kalamazoo, and Hugh G. Hoffman, a son, the executor of his will, a traveling salesman, married and residing in the city of Chicago. The Hoffman homestead, then occupied by the deceased and his wife, was located on West street in the city of Kalamazoo.

In the month of January, 1911, Mrs. Hoffman was advised by her physicians that she was afflicted with cancer and probably could live but a short time. At that time Mr. and Mrs. Hoffman were residing alone in the family homestead, Mr. Hoffman himself taking most of his meals at the State Hospital and sleeping in his apartments there considerable of the time. Mrs. Hoffman, upon learning her real condition from the physicians, telephoned her daughter, Mrs. Foote, the claimant, who, with her husband, lived in a house a few blocks away which belonged to Mrs. Hoffman, and from whom they rented. The principal evidence relied upon to sustain the implied contract is talk which occurred when Mr. and Mrs. Foote went to the family home after receiving the telephone message from Mrs. Hoffman. The only testimony on this subject is that of the husband of the claimant. It is very brief and may be stated as follows, as testified to by him:

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"She asked us to come over, and stated to us that she had been to Battle Creek that day for a physical examination and that while there she was told she had a fatal malady, a cancer. She asked us if we would close up our house and come over and keep house for them, and take care of her as long as she should live. When we got the telephone message I think we were just about to eat dinner and we went over right after dinner.

"The conversation just related took place as soon as we arrived at the Hoffman home. Mr. and Mrs. Hoffman and Mrs. Foote and myself were present. As I remember it, after telling us of her fatal malady and that the doctors had given her about a year to live, she asked us: 'Will you come over and keep house for us and take care of me, and you will never regret it?' Mr. Hoffman nodded his head and said: 'Yes, we want you to come over.' "

The evidence shows that two days thereafter the claimant and her husband moved over to the Hoffman home, taking their clothing and personal effects, and closed up their house, and continued to live in the family home from that date until the time of the trial. The claimant accompanied her mother to Rochester, Minn., and to Detroit, where she went for medical and surgical assistance. Mrs. Hoffman died February 26, 1912. During this time John A. Hoffman paid the usual household allowance for maintaining the table of $30 a month, which had been the amount he had always paid for that purpose during his married life, or at least the latter years thereof. He also paid the fuel, gas, telephone, and other incidental bills of the house. Toward the latter portion of Mrs. Hoffman's illness there were two trained nurses provided for the care of Mrs. Hoffman, but claimant assisted daily in such care.

As all except the first claim was either disallowed by the jury or set aside by the trial court, we omit from the statement of facts what occurred subsequent to Mrs. Hoffman's death. There is no question raised

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that the claimant took charge of the household matters and assisted daily in the care of her mother, whose condition was such that it necessitated the changing of her clothing and bedding frequently; and the claimant, in addition to the other household duties, generally did the washing and laundry work necessary to keep the sick woman in proper condition. No question is raised here that the claimant was not faithful and attentive in the care of her mother, and in her work as housekeeper. It also appeared in evidence, and perhaps should be stated, that Mrs. Hoffman, before her death, had deeded to the claimant and to her son Hugh, the executor here, the house and lot on Cedar street, where the claimant and her husband had been living, subject to a life lease to John A. Hoffman; and it further appeared that, after the death of Mrs. Hoffman, the claimant and her brother, at the request of John A. Hoffman, gave him a quitclaim deed of that property without any actual consideration therefor. It also appeared that, on April 14, 1914, John A. Hoffman made a will, and in that will he devised to the claimant the use of the homestead during her life. The remainder over, and all of his other property were willed to the son, Hugh, the executor and appellant. The inventory of the estate showed that the homestead was of the value of $8,000. All the rest of the estate willed to the son Hugh was inventoried at $8,853.78, while the debts allowed against the estate, and unappealed from, were $2,859.82.

The claimant instituted a contest of the will on grounds of mental incompetency and undue influence. The will was admitted to probate in the probate court on January 6, 1915, and the claimant appealed to the circuit court, but the appeal was dismissed on October 28, 1915, before the filing of the claim under consideration.

The evidence shows that the claim, which is the

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basis of this judgment, was never called to the attention of John A. Hoffman during his lifetime. The rental which claimant and her husband paid for the property on Cedar street was $12 per month. After the death of Mrs. Hoffman, and Mr. Hoffman had agreed to let the claimant and her husband live in the homestead, they moved all of their property out of the house which they had rented, and made their home in what had been the Hoffman family homestead. Mr. Hoffman, during his lifetime, continued to pay an allowance of $30 per month for the table. It also appeared, upon the cross-examination of claimant's husband, that he gave to John A. Hoffman a note for back rent upon the Cedar street property, which note at the time of the trial had not been paid.

The trial judge filed a written opinion on the motion to enter judgment notwithstanding the verdict; and, omitting portions of the opinion which related to matters that are not now here involved, and, after repeating the substance of the testimony with reference to what was said by Mrs. Hoffman in the presence of her husband and assented to by him, the court said:

"When the proofs were closed counsel for the estate asked that a verdict be directed against the claimant. Decision on such motion was reserved under the provisions of Act No. 217 of the Public Acts of 1915. The cause was submitted to the jury and a verdict rendered and recorded as above stated. Counsel have now further argued such request. The claim of the estate is that the evidence submitted does not establish an express contract, nor is it sufficient on which to imply a contract, when the relationship of the parties is considered.

"Counsel seem agreed that the proofs are not sufficient to support an express contract. The facts relied upon to establish an implied contract are:

"*First.* That claimant and her husband closed their own home and went to that of her father and mother to look after the home and attend her mother at their request.

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"*Second.* That the mother said to her in the presence of her father that if she would do so, 'you will never regret it,' which was assented to by the father.

"In 18 Cyc., at page 412, the rule is thus laid down:

"'The courts regard with suspicion and disfavor claims brought against a decedent's estate for personal services rendered by relatives, especially where the latter are members of his immediate family or household, as the presumption is that such services, between persons occupying such relations, are intended to be gratuitous.'

"Stress is laid by the writer in the concluding part of the paragraph on the fact that such claims are more favorably regarded when decedent and claimant do not live together. All the Michigan cases cited are, I believe, in harmony with this rule. While there need not be an express contract, in terms, the proofs must be of such a nature that one can be implied, and such proofs must overcome the presumption arising from the family relation. It is not enough to prove that the care was rendered. The proofs must go further and show that they were rendered under such circumstances as rebut the presumption that they were gratuitous and justify the inference that the daughter expected to be compensated, and the father expected to pay her for the same. See *Ashley* v. *Smith's Estate,* 152 Mich. 197; *Weessies* v. *Van Dyke's Estate,* 159 Mich. 180; *Maynard* v. *Schrumpf's Estate,* 192 Mich. 494.

"Let us now apply the rules just stated to the facts in this case. The claimant and her husband had for many years lived separate and apart from her parents, though in the same city; they shut up their home and went to the parents' home at their request; they remained there for more than a year, until the mother's death. They were urged to come, and assured that if they did they would never regret it. These facts, undisputed, seem to me much stronger than those established in the *Ashley Case,* which the court held justified the jury in finding for the claimant. We have here a valuable service rendered, a service consisting not only of tender care and gentle ministrations to a mother afflicted with an incurable disease, but one in which domestic duties were performed. We find the

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daughter giving up her own home, her interest in society, the pleasures of life which she had theretofore enjoyed, to attend at the bedside of her stricken mother. This filial love and affection would prompt her to do. But when to this is added her services as a housekeeper, services which could well have been performed by any competent domestic, a different condition is presented, and which, I think, under the proofs, fully justified the jury in finding that such services were rendered under expectation on the part of both father and daughter, that they should be reasonably compensated for."

It was the argument of counsel for the appellant in this court that there was no evidence from which a contract could be implied. In addition to the authorities cited by the trial judge, counsel for appellant also cite *Sammon* v. *Wood,* 107 Mich. 506; *In re Abel's Estate,* 173 Mich. 93; *In re Colburn's Estate,* 153 Mich. 206; *Decker* v. *Kanous' Estate,* 129 Mich. 146.

In *Re Abel's Estate, supra,* we said:

"It is not essential, to a recovery by a child for services rendered to a parent, that a formal contract be established in relation thereto; but if the facts and circumstances attending the performance of the work and in its acceptance are sufficient to rebut the presumption that the services were gratuitous, and to authorize the inference that both parties acted under the understanding that they were to be paid for, the parent is liable."

Upon this subject an interesting note will be found appended to the case of *Hodge* v. *Hodge,* 11 L. R. A. [N. S.] 873 (47 Wash. 196).

Some respectable courts have gone to the extent of holding that a child living separate and apart from a parent, who is himself in comfortable circumstances, is under no obligation to perform services for him without payment, and consequently the presumption against payment does not obtain. 21 Am. & Eng. Enc. Law (2d Ed.), p. 1063, and cases cited.

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We do not, however, assent to this view. The better doctrine is that expressed in *Wessinger* v. *Roberts*, 67 S. C. 240, the headnote of which case reads as follows:

"The presumption that services rendered to a mother by a daughter are gratuitous, is not of itself destroyed by the fact that they were not members of the same household, yet this fact weakens the presumption, and it may be regarded as giving support to other facts tending to establish an implied contract."

We think there were certain significant facts in the case which warranted the learned trial judge in submitting the case to the jury. It is undisputed that Mr. Hoffman and his wife were living alone in the homestead. The claimant, a daughter, with her husband, had been living since 1898 in their own rented home, but in the same city. They were sent for by the parents. The request was made as above set forth. It would seem that Mrs. Hoffman, with the consent of her husband, gave herself into the care and charge of her daughter, who not only took personal care of her mother, but entire charge of the household, and directed its affairs for over one year. The extent and character of the services rendered have been held to be important factors in determining whether they are to be regarded as gratuitous. The circumstances surrounding the rendering of the services here, together with the expression made by the mother and assented to by the father, which we have quoted, were sufficient, in our opinion, to send the case to the jury. We are not aware of any decision of this court which will be disturbed by holding that the judgment, including interest, for the small sum found by the jury, should be affirmed; and the same is affirmed accordingly.

BIRD, MOORE, STEERE, BROOKE, and FELLOWS, JJ., concurred. OSTRANDER, C. J., and KUHN, J., did not sit.

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JACOBS v. GLASSER & HOFFMAN.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—FINDINGS OF INDUSTRIAL ACCIDENT BOARD—REVIEW.

   On certiorari to review an award by the industrial accident board, under the workmen's compensation law, a finding of the board, supported by evidence, will not be reviewed.

2. SAME.

   An order of the industrial accident board finding that plaintiff was entitled to compensation for partial disability from and after a certain date, at the rate of one-half the difference between his average weekly wage before and after the injury, was merely a statement of the law, of which defendants could not complain, in the absence of any evidence as to partial disability, or the fixing of any definite amount, but leaving this question to future proof.

Certiorari to Industrial Accident Board. Submitted January 15, 1918. (Docket No. 76.) Decided March 27, 1918.

Thomas Jacobs presented his claim for compensation against Glasser & Hoffman for injuries received in defendants' employ. From an order awarding compensation for partial disability, defendants and the Union Casualty Insurance Company, insurer, bring certiorari. Affirmed.

Joseph Sanders, for appellants.

Carey J. Cole, for appellee.

BROOKE, J. On June 21, 1915, the claimant was injured, in the course of his employment, by the walls of a ditch caving in upon him. His employers, Glasser & Hoffman, plumbing contractors, of the city of De-

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troit, duly reported the accident to the industrial accident board and notified their insurer, the Union Casualty Insurance Company, who, on July 5, 1915, entered into a written agreement with claimant to pay him the sum of $9.61 per week, which agreement was duly filed with the industrial accident board. Compensation was paid to claimant in accordance therewith until September 6, 1915, when payments were discontinued, for the alleged reason that the insurer had been informed by medical experts that claimant was then able to return to work and was no longer suffering from any disability. No agreement had been reached with claimant that the compensation should cease, nor had the discontinuance of payments been authorized by the industrial accident board. On October 19, 1915, respondents petitioned the board for an order suspending payments and terminating the period of disability as of the date when payments were discontinued, and, after considerable delay and correspondence, a hearing was had on January 13, 1916. At that time claimant filed with the board a petition to amend the agreement for compensation so as to extend the compensation for a period of 500 weeks at the same rate, and, in support of this petition, filed affidavits of himself and his wife and also affidavits by Dr. Jacob H. Polozker, Dr. Joseph Rottenberg, Benjamin Wolach, and Charles W. Connor. Both parties were represented by attorneys, and the facts were argued at length before the board. Fifteen days were then granted to both sides to obtain and file proofs regarding their respective contentions and the condition of the injured employee. On January 29, 1916, respondents filed with the board the deposition of Helen Gray, taken in Philadelphia, which deposition was in the nature of a report of an operative employed to watch the actions of claimant around the apartments where he resided and where he had been doing janitor

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work up to the time of his injury, and tended to support respondents' claim that the claimant's disability had ceased and that he was able to resume work. After consideration of the foregoing information, and having waited a period of 43 days for the filing of proofs, the board, on February 25, 1916, entered an order denying respondents' petition and finding that applicant was entitled to recover from respondents compensation at the rate of $9.61 per week from September 6, 1915, to October 19, 1915, and further, that applicant is entitled to recover from respondents compensation for partial disability from and after October 19, 1915, at the rate of one-half the difference between his average weekly wage before and after the injury. Some time later the respondent insurer paid claimant the compensation from September 6th to October 19, 1915, $57.68, but has paid no further sum.

After the order was entered, and on March 1, 1916, respondents filed the depositions of Frank W. Gray and Dr. George E. Chene in support of their contentions, and on the following day claimant filed depositions of Dr. Joseph Rottenberg, Ben Wolach, Martha Laplaunt, Lillian Wolach, Lillian Solomon, and Cora Johnston, also depositions of himself and wife, and on March 4th claimant filed another petition asking for a supplemental order awarding full compensation at $9.61 up to that date. The board has made no further order nor any modification of its former order.

In the affidavit for writ of certiorari, respondents state, among other things:

"VII. That on February 25, 1916, with only respondents' petition (Exhibit B), respondents' deposition (Exhibit C) before it, the industrial accident board entered an order in the said cause, a copy of which is hereto annexed. * * *

"VIII. That in the order of the said industrial accident board there is manifest error which ought to be reversed and set aside for the following reasons:

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"(1) That the proofs before the board on the 25th day of February, 1916, the date upon which the said order was entered, conclusively established the allegations of the petition of respondents as set forth in Exhibit B, hereto attached, praying for discontinuance of payments to claimant, and therefore there was nothing before the board upon which could be based its order in relation to future payments to claimant for partial disability.

"(2) That the board exceeded its authority in entering an order without any evidence before it upon which such order might be based.

"(3) That the order of the board as to future payments to claimant for partial disability is opposed to the only evidence that was before the board at the time such order was entered.

"(4) That if the record before the board was incomplete on the date of such order, the only possible proceeding for the board was to dismiss such petition and the board was in error in not ordering such dismissal."

The return of the industrial accident board contains the following:

"13. Said industrial accident board further returns that paragraph seven (7) of respondents' affidavit for writ of certiorari is very incorrect, and avers that said industrial accident board, on February 25, 1916, when it made its order complained of in this case, had before it the following papers which it considered in the making of said order:

"(1) A copy of the agreement in regard to compensation heretofore referred to.

"(2) The petition of the respondents to stop payments.

"(3) The petition of the applicant asking that the board find that the applicant was permanently disabled and which consisted of the affidavit of the applicant himself, and of the affidavit of Dr. Joseph Rottenberg, and of the affidavit of Beatrice Jacobs, and of the affidavit of Benjamin Wolach, and of the affidavit of Charles W. Connor, * * *

"(4) The deposition of Helen Gray.

"(5) Said board also had the benefit of the argu-

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ments of attorneys for the respective parties, which arguments were made before the board on January 13, 1916, and said board had before it at that time sufficient papers, proofs and testimony upon which to base an intelligent order, and it believes that the order it made on that date is the order that should have been made in said cause, and avers that it has carefully considered the testimony filed since that time, and that its order would have been the same had all of said testimony been before it.

"14. Said board further returns that, as a matter of fact, its order of February 25, 1916, was merely an order of the board affirming that the agreement between the parties should stand, and indicating that possibly the applicant might be able to work some after October 19, 1915. Under the terms of said order, if said applicant were unable to work after that date, the compensation of said applicant would still continue at $9.61 per week, but if said applicant were able to work some, then his compensation would be reduced proportionately under the terms of the workmen's compensation law."

It seems to be the claim of the respondents and appellants that the industrial accident board, at the time of the entering of the order made on February 25, 1916, had before it simply the uncontradicted evidence of the facts established by the deposition of Helen Gray, and that, with simply these facts before it, the board should have entered an order for the discontinuance of payments to the claimant in accordance with the petition filed for such relief. We think it a sufficient answer to this contention to call attention to the return of the board, which sets forth that at the time of the making of the return they had before them the counter-showing of the claimant, and they aver that they have carefully considered the testimony filed, and that the order would have been the same had all the testimony been before them at the time of the making thereof. In our opinion, and in accordance with our previous decisions, we do not believe that the

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administration of this act should be too technical, and we can see no reason, if the board, with all the testimony before them, return to us that they were of the opinion that the petition should be denied, why it should not be said that there was a question of fact squarely presented to them, and they having determined it, we are in no position to review it, because of the fact that the legislature by the terms of the act has made the decision of the board binding as to such questions. Section 12, pt. 3, Act No. 10, Extra Session 1912 (2 Comp. Laws 1915, § 5465). See *Papinaw* v. *Railway Co.*, 189 Mich. 441; *Ramlow* v. *Ice Co.*, 192 Mich. 505; *Reck* v. *Whittlesberger*, 181 Mich. 463.

Up to the time that the order denying this petition was made, no formal order of the board had been made approving the agreement for compensation. It is now also urged that there was no evidence of any kind before the board which would warrant the finding of partial disability and that therefore no such order should have been made. We see no harm to the defendants, however, from the part of the order thus complained of, which reads:

"It is further ordered and adjudged that said applicant is entitled to recover from said respondents compensation for partial disability from and after said October 19, 1915, at the rate of one-half the difference between his average weekly wage before the injury and the average weekly wage which he is able to earn thereafter."

So far as this part of the order is concerned, it was merely a statement of the law that the injured employee was entitled to weekly compensation equal to one-half the difference between his average weekly wages before the injury and the average weekly wages he is able to earn thereafter (section 10, pt. 2, Act No. 10, Extra Session 1912, 2 Comp. Laws 1915, § 5440). The order does not state any definite

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amount for the future payments, but leaves this question to future proof.

We see no legal infirmity in the order as made, and therefore affirm the action of the board.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, FELLOWS, and STONE, JJ., concurred. KUHN, J., did not sit.

ELWELL v. PIERCE.

1. EXECUTORS AND ADMINISTRATORS—ACCOUNTING—EQUITY—JURISDICTION.

   On a bill by the administrator and the heirs of a deceased insane person against the wife and children of a former guardian, to enable the administrator to marshal the assets of the estate, which involves an intricate and complex accounting covering a long period of years, and there is no proceeding in which the administrator can obtain the relief sought other than by an equity proceeding, the court of equity has jurisdiction.

2. SAME—DEMURRER—PLEADING.

   On cross-appeals from an order sustaining demurrers to the bill and cross-bills, in view of the complexity of the questions raised, and of the fact that from the pleadings it is impossible for the appellate court to decide them, the demurrers will be overruled and the case remanded to the court below for hearing upon the merits upon proper pleadings.

Cross-appeals from Kalamazoo; Weimer, J. Submitted January 24, 1918. (Docket No. 127.) Decided March 27, 1918.

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Bill by Hubert Elwell, administrator of the estate of Jeanette Parish, deceased, and others against Julia Pierce and others. Defendants demurred to the bill and filed a cross-bill to which plaintiffs demurred. From a decree dismissing the bill and cross-bill, all parties appeal. Reversed and remanded.

William E. Ware (*Burritt Hamilton*, of counsel), for plaintiffs.

Boudeman & Adams, for defendants.

In this case both parties, except defendant City Bank, appeal from a decree rendered by the circuit court of Kalamazoo county, in chancery. The issues are raised by two demurrers: *First*, the demurrer of defendants (embraced as a part of the answer of defendants to the original bill of complaint), and, *second*, a demurrer by plaintiffs to the cross-bill of complaint of defendants, which cross-bill is contained in, and is a part of, the answer of defendants to the original bill. The demurrers were argued before the court at the same time and the court dismissed both the original and cross-bills.

The controversy arose from the following facts: On March 18, 1869, Horace H. Pierce was duly appointed guardian of his insane sister, Jeanette Parish, by the probate court of Kalamazoo county, and immediately took possession of all of her property, consisting of 40 acres of land, deeded to her by their father, and some personal property, and continued in possession of the same and in the management and control of all her affairs until he died, September 12, 1910, during which time he received her pension from the United States government, allowed for herself and her three children, plaintiffs herein. Acting upon his petition as guardian, the probate court, on March 27, 1869, adjudged Jeanette Parish insane and ordered

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her confined to the Western Michigan Asylum at the expense of the public, as an indigent person, where she remained hopelessly insane until her death on November 18, 1913. Plaintiff Hubert Elwell was appointed administrator of her estate February 3, 1914, and as such, together with the other plaintiffs, the children and only heirs of said Jeanette Parish, deceased, filed this bill on May 20, 1915, for an accounting and to recover and collect the amount due the estate of Jeanette Parish, deceased, from her said guardian, Horace H. Pierce, at the time of his death, with accrued interest, and to establish and enforce an equitable first lien for the collection and recovery thereof upon lands deeded by said Horace H. Pierce to his wife and children, the defendants herein, in 1892 or 1893, which, it is alleged, was with the intent and purpose of cheating and defrauding his said ward in her lifetime and her heirs after her death; also to determine to whom the funds of the estate, when collected and recovered by him, together with the proceeds of the sale of her lands in his hands, should be distributed by said probate court. After the death of Horace H. Pierce, Judson W. Pierce was appointed guardian and sold the lands of the ward under an order and license of the probate court and turned the proceeds thereof, $1,678, after her death to the administrator of her estate, which are now in his hands. The bill charges the guardian, Horace H. Pierce, with fraud in all of his transactions relative to the execution of his trust as such guardian. That he fraudulently procured the confinement of his ward in the asylum at public expense, where she remained as such until November 1, 1881, after which time he made payments to the asylum for her maintenance. That he fraudulently never kept any books of account of the funds received by him or the disbursements made by him as such guardian, never filed an inventory or any account of the

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estate in the probate court. That while his ward was still alive, by means of false and fraudulent statements he induced the children of his ward, who are plaintiffs herein, to give their respective quitclaim deeds to him and Phoebe Pierce for him, of all their interest in the lands of their mother and her personal estate to be distributed after her death. That he undertook to convey and transfer all his property, real and personal, including the entire estate of this ward which he then had in his possession, by deed to his wife and children, but which deed was not recorded until some days after his death, and that he died intestate and no administration of his estate has ever been had or applied for. The defendants by their cross-bill claim the benefits of all the acts and doings of Horace H. Pierce in the premises and insist that thereunder and thereby they are the owners of all and singular the property and effects of Jeanette Parish, including the funds now in the hands of the administrator and also including anything found due upon an accounting herein to her administrator and claim that plaintiffs, the children of Jeanette Parish, have no interest therein.

BROOKE, J. (*after stating the facts*). The first question that challenges our attention in the consideration of this case is the question of jurisdiction. It is urged by counsel for the defendants that the equity court is not the proper forum in which to bring this action, because, as it is said in their brief:

"There is nothing in this case to take it out of the general rule of claims against the estate of deceased persons."

This bill is filed by the administrator and the heirs of Jeanette Parish to enable the administrator of the estate to marshal the assets of the estate and to bring such assets into the probate court to be distributed

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according to law. The theory of the bill involves an intricate and complex accounting covering a long period of years, and in our opinion there is no proceeding in which the administrator can obtain the relief he here seeks other than by an equity proceeding as outlined by his bill. See section 13880, 3 Comp. Laws 1915; *Graham* v. *Graham*, 171 Mich. 307. We are therefore of the opinion that the equity court has jurisdiction in the premises.

The other questions which are presented and argued in the briefs involve the question of laches, because of the plaintiffs' failure for so many years to bring some appropriate action; also the question of the validity of the instruments called quitclaim deeds and the adequacy of the consideration therein expressed.

The relief prayed for in the cross-bill of the defendants is based upon the effect and validity of these three so-called quitclaim deeds. The first, made by plaintiff Luella Parish Delano and her husband to Horace H. Pierce, it is alleged in the bill of complaint, was in the ordinary form of quitclaim deed used in this State. In the instrument there is a special provision, which is set up in the bill of complaint as follows:

"This deed is intended by 1st parties to convey all rights to above described land possessed by them as heirs of Jenett Parish and also any and all rights to said premises and all personal property of said Jenett Parish which she shall be possessed of at the time of her decease to which the 1st parties would be entitled as heirs if this deed were not made."

A similar provision is contained in the instrument given by Eugene M. Parish and wife. The third instrument, given by Lavilla Parish, was a quitclaim deed in the form in common use, without any special provision. Counsel for defendants, in the discussion of the effect of these instruments, do not claim that

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they convey, or could convey, any interest which Jeanette Parish had either in her real estate or personal property. It is the claim of the plaintiffs that the intent of these three conveyances, evidenced by the writings in question, was to sell all the right and interest which they would have in the property comprising the estate of their mother. It is their claim that they signed these deeds because of fraudulent misrepresentations made to them at the time, and that they received no proper and adequate consideration for the transfer. This is denied by the defendants. In view of the complexity of the questions here raised and of the fact that from the pleadings it is impossible to get all the information that should be before us in order to determine these questions, we are of the opinion that the case should not be decided upon the record as here presented. The case should be heard upon its merits in the court below, so that a full inquiry can be made into the allegations in the bill of complaint and in the cross-bill. We must therefore decline to pass upon these questions upon the record as here presented, and under the authority of *Osborn* v. *City of Ann Arbor,* 189 Mich. 96; *Comstock* v. *Deane,* 197 Mich. 388, and *Grand Rapids Trust Co.* v. *Nichols,* 199 Mich. 126, we are constrained to reverse the order of the court sustaining the demurrers.

The demurrers to the bill of complaint and also to the cross-bill are hereby overruled, and the case is remanded to the court below with the direction to the parties to file proper pleadings to bring the case to an issue under the rules of the court. Costs to plaintiffs.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, FELLOWS, and STONE, JJ., concurred. KUHN, J., did not sit.

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DETROIT & NORTHERN MICHIGAN BUILDING & LOAN ASSOCIATION *v.* ORAM.

1. SUBROGATION—MISTAKE OF FACT—INTENT—EVIDENCE—FINDING OF COURT—MORTGAGES—GIFTS.

   Where decedent had only a life estate in land devised to her by her husband subject to a mortgage of $5,500, which she, with money from her separate estate, reduced to $3,000, and later executed a new mortgage paying the first one in full, evidence *held*, to sustain the finding of the lower court that decedent acted under a mistake of fact that she was the owner of the fee, and not with the intention of making a gift to the remainderman.

2. SAME—EXECUTORS AND ADMINISTRATORS — INTERVENERS — STATUTES—MORTGAGES.

   In equity proceedings by the mortgagee in the second mortgage to revive the first mortgage and subrogate it to the rights of the mortgagee therein, the executor of decedent's estate had such interest in the litigation as to entitle him to intervene under section 12362, 3 Comp. Laws 1915.

3. SAME—LIFE TENANT—MORTGAGES, DUTY OF REMAINDERMAN TO PAY.

   The rule is well settled that though a life tenant is under no obligation to pay off the principal of an incumbrance, even to prevent a foreclosure sale, yet if he does so, he is entitled to call upon the remainderman for contribution, and has a lien on the property for the amount due; and that the amount for which the remainderman is liable is the amount paid less the amount of interest which would have been payable by the life tenant.

4. SAME—LIFE TENANT—VOLUNTARY PAYMENT—LIEN.

   While a life tenant cannot claim a lien for payments made voluntarily, with no purpose to bind the remainderman, payments made in ignorance of the real facts cannot be said to be voluntary.

5. SAME—MISTAKE OF FACT—EQUITY—JURISDICTION.

   That the inequalities resulting from a clear mistake of fact, one of the fundamental grounds of equity jurisdiction, may be remedied by subrogation, is well supported by precedents.

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6. SAME—MORTGAGES—PAYMENT—DEMAND—PRESUMPTIONS.
Where the life tenant paid a mortgage which was long overdue, in the absence of direct proof of an agreement to extend, the presumption would be that payment was demanded.

7. SAME—MISTAKE OF FACT—EQUITY.
When the basis for subrogation is payment under a mistake of fact, usually the only essential questions are the right to pay and whether there are any intervening equities that will be prejudiced by allowing subrogation.

8. SAME—MORTGAGES—PAYMENT BY LIFE TENANT—REMAINDERMAN.
Where the life tenant paid $2,500 on the original mortgage, then overdue, under a mistake of fact that she was the owner of the fee of the premises, and there are no intervening equities that can be prejudiced, she should, to the extent of such payment, deducting interest for the duration of her life tenancy, be subrogated to the rights of the original mortgagee, as against the remaindermen, since the latter would have been bound to pay the mortgage to protect his estate.

9. SAME—MISTAKE OF FACT—LIEN OF MORTGAGEE.
Plaintiff, having loaned a sum of money for the express purpose of paying a prior incumbrance on the land taken as security for such loan under a mistake of fact whereby the mortgage became defective, and there being no intervening incumbrances or equities, is entitled to be subrogated to the lien of the incumbrance so discharged, to the extent of the amount paid.

10. SAME.
Where the second mortgage given to plaintiff was for a larger amount than the remaining incumbrance, and decedent, who was personally liable on the note and mortgage, received the benefit over and above the amount required to pay said incumbrance, her executor having intervened, equity will give plaintiff a lien on the amount to which decedent was entitled to be subrogated to pay the balance due on plaintiff's mortgage over and above the amount to which it is entitled to be subrogated.

11. SAME—MORTGAGES—RIGHT TO FORECLOSE.
Plaintiff and intervener, as the equitable assignees of the original mortgage, should have the right to foreclose the same to enforce payment.

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Appeal from Houghton; O'Brien, J. Submitted January 18, 1918. (Docket No. 150.) Decided March 27, 1918. Rehearing denied June 20, 1918.

Bill by the Detroit & Northern Michigan Building & Loan Association against Minnie K. Oram and others to set aside the discharge of a mortgage, for subrogation to the rights of the mortgagee, and to foreclose the same. Joseph Strobel, executor of the will of Elizabeth Kaspers-Gitzen, intervened claiming equities. From a decree for plaintiff and the intervener, defendants appeal. Affirmed.

Hanchette & Lawton, for plaintiff and intervener.

J. F. Hambitzer, for defendants.

KUHN, J. John Kaspers in his lifetime was a resident of the village of Houghton and owned a corner lot on the main street of the village, in the business district, on which stood a two-story store building and other adjoining structures. He died July 23, 1903, leaving a will which gave a life estate in this property to his wife, Elizabeth, with remainder to his son, Gabriel. At the time of his death there was a mortgage of $5,500 on this land, held by one Elizabeth Hennes, then by its terms overdue. In the inventory of his estate this piece of real estate was appraised at $12,500, subject to a mortgage of $5,500. Some time in the following year the son, Gabriel, died, leaving a widow, Minnie, and a young child, Joseph Gabriel Kaspers. In 1906, Mrs. Elizabeth Kaspers sold a certain property in Hurontown belonging to her as part of her separate estate, and out of the proceeds paid Mrs. Hennes $2,500 on account of the principal of the above mentioned mortgage. In January, 1909, she legally adopted her grandson, Joseph Gabriel Kaspers, and a few days later, at the age of 67, married

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one Joseph Gitzen of Houghton, then about 65 years of age.

On July 21, 1912, a transaction was completed whereby the plaintiff Detroit & Northern Michigan Building & Loan Association loaned to said Elizabeth Kaspers-Gitzen the sum of $4,500 on the security of a mortgage covering the Houghton store property above mentioned, signed by Mrs. Gitzen alone, and at her request applied $3,000 of this loan to paying the balance of principal and obtaining a discharge of the Hennes mortgage on said property, the remaining $1,500 being paid over to Mrs. Gitzen. Before making this loan, the plaintiff had an abstract of title prepared by the register of deeds, who certified that the title to the property in question was in Mrs. Gitzen. Later the loan was increased, and in this transaction the $4,500 mortgage was discharged and a new mortgage for $4,800 given, the register of deeds again certifying as before with reference to the title. This mortgage was payable in installments, so that if the payments were regularly made it would be paid in full in 11 or 12 years. In 1914, Mrs. Gitzen sold another piece of property belonging to her separate estate—this one in West Houghton—and from the proceeds paid $800 on account of her mortgage to plaintiff. Mrs. Gitzen died February 25, 1915, possessed of practically no estate except her interest in this store property, but made a will in which, after a bequest of $500, she gave a life estate in her property to her husband, Joseph Gitzen, with remainder to her adopted son (her grandson), Joseph Gabriel Kaspers. Shortly afterwards the boy was adopted by his own mother and her second husband, Minnie Kaspers-Oram and John Oram.

After the death of Mrs. Gitzen, plaintiff discovered that the abstracter had made a mistake in the abstract of the mortgaged property in question, and that Mrs.

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Gitzen, instead of being the owner of the fee, had only a life estate. Plaintiff thereupon filed a bill against Minnie Kaspers-Oram and Joseph Kaspers-Oram, the heirs of Gabriel Kaspers, the remainderman under the will of John Kaspers, deceased, claiming a mistake of fact, and asking that the discharge of the Elizabeth Hennes mortgage be set aside and the mortgage revived and that plaintiff be decreed to be the equitable assignee thereof and subrogated to the rights of Elizabeth Hennes therein, and praying for the foreclosure of said mortgage.

After the hearing of the case had begun and a portion of the testimony had been taken, Joseph Strobel, executor of the will of Elizabeth Kaspers-Gitzen, filed a petition or bill for intervention in said cause, setting up the fact of the payment by Mrs. Gitzen of the $2,500 on account of the Hennes mortgage, which fact was not alleged in the original bill, and praying that she be subrogated to the Hennes mortgage for the amount of this payment, or at least for so much of said amount as might remain after the balance due to the plaintiff had been satisfied. The intervention was allowed by the court below.

The defendants denied the right of plaintiff to the relief prayed for, contested the right of the executor to intervene and also denied that he was entitled to the relief sought by him. They denied that Mrs. Gitzen, in her dealings with the property in question, believed that she was the owner of the fee thereof, or that she intended to claim or have any lien for the $2,500 paid by her on the mortgage, or that there was any necessity for the payment of the Hennes mortgage, but claimed that the partial payment of $2,500 by Mrs. Gitzen was a voluntary payment in the nature of a gift, with the purpose and intent to reduce the incumbrance for the benefit of her grandson, one of the remaindermen; further, that Mr. Gitzen, after her

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marriage, dominated her and induced her to waste her property for his benefit, and that the sole purpose of the transaction with plaintiff was to obtain $1,500 to spend, and the sole reason for the discharge of the Hennes mortgage was that plaintiff would not take a second mortgage on the property, but insisted on combining the loans and taking a first mortgage for the entire amount. They claimed this latter transaction was neither necessary nor for the benefit of the remainderman, but was a mere voluntary payment.

As bearing on these claims, considerable testimony was admitted by the court, and after hearing all this testimony, the learned trial judge was clearly impressed that Mrs. Gitzen had acted in entire good faith in these transactions under the mistaken belief that she owned the fee of the property. Referring to the payment of the balance of the Hennes mortgage, he said:

"It is quite evident from all the testimony that this payment was made by Mrs. Gitzen under the impression that she was the sole owner of the premises."

The court granted a decree, reviving the Elizabeth Hennes mortgage for $5,500 for the benefit of the plaintiff and the intervener, subrogating plaintiff and intervener to the rights of Elizabeth Hennes in and to the mortgage, granting priority to plaintiff's lien over that of intervener, fixing the amount of plaintiff's lien at $3,700.72, with interest at 7 per cent. from the date of Mrs. Gitzen's death, the intervener's lien to be for the residue; decreeing plaintiff and the intervener to be the equitable assignees of said mortgage, with right to foreclose the same, and fixing the amount due under the mortgage at $5,500 with interest thereon at 7 per cent. from the date of Mrs. Gitzen's death.

An appeal having been taken from this decree, appellants' counsel, at the outset of his argument, in his brief, renews his contention that Mrs. Gitzen acted

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with full knowledge of the true state of the title to the property in question. While it is impossible, within the purview of this opinion, to review the testimony upon this question, which was introduced on the hearing below, after a careful study thereof we are impressed that the circuit judge was clearly right in his conclusion that Mrs. Gitzen believed that she was the sole owner of the premises. Her adopting her grandson to make him her heir, her inducing Mr. Gitzen to distribute his own property among his children before the marriage, her applying all the proceeds of the sales of her individual property that she could spare to the reduction of the incumbrance on this store property, the money and labor contributed by herself and Mr. Gitzen towards improving the buildings, her making a will, after she had thus spent all her own sole and separate estate, in which she evidently sincerely believed she was fulfilling her long cherished purpose of leaving a substantial and profitable inheritance to her grandchild—in short, her whole course of action cannot be reasonably explained or rendered consistent on any other theory than that she believed the store property had passed to her absolutely under her husband's will and that she was dealing with and disposing of her own. The testimony of defendants' witnesses as to her statements, it seems to us, supports this theory far more strongly than it does that of the defense.

1. Before passing to the consideration of the question of plaintiff's and intervener's respective rights of subrogation, a preliminary question demands consideration. Had the executor of the will of Mrs. Gitzen a right to intervene in these proceedings?

A rule as to intervention was incorporated in the judicature act (Act No. 314, Pub. Acts 1915), appearing as section 11 of chap. 12 (§ 12362, 3 Comp. Laws 1915), which reads as follows:

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"In an action either at law, or in equity, anyone claiming an interest in the litigation may, at any time, be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of the propriety of the main proceeding."

This act, by its terms, is declared to be remedial and, as such, entitled to a liberal construction to effectuate the intents and purposes thereof. The section in question has already had the consideration of this court in *Weatherby* v. *Kent Circuit Judge*, 194 Mich. 46, and *McMillan* v. *School District, ante*, 280.

We think it can fairly be said that the intervener herein is asserting "a claim to, or lien upon, the property, or some part thereof, which is the subject of litigation," and also has an interest in the litigation "of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment." See opinion of Field, J., in *Horn* v. *Water Co.*, 13 Cal. 62, cited with approval in *Smith* v. *Gale*, 144 U. S. 509. A mortgage, discharged of record, is sought to be revived and declared a lien on real estate to the extent of plaintiff's claim. The intervener seeks to have it declared a lien for the full face amount thereof in order also to secure the claim of his testatrix. Both claims arose out of a mistake concerning the same fact, viz., the ownership of the property which furnished the basis of, and supposed security for, their respective payments of money. Moreover, the plaintiff holds a note and mortgage given by intervener's testatrix which is a claim against her estate, and whatever plaintiff is able to realize out of his subrogation to the Hennes mortgage will reduce to that extent the amount of the indebtedness of the estate of intervener's testatrix. We think, therefore, that the intervention was properly allowed.

2. Is the executor of Mrs. Gitzen's will, by reason of the payment by her of $2,500 on account of the

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Hennes mortgage, entitled either to a lien for that amount on the store property as against the remainderman, or to be subrogated *pro tanto* to the Hennes mortgage?

The rule is well settled that though a life tenant is under no obligation to pay off the principal of an incumbrance, even to prevent a foreclosure sale, yet if he does so, he is entitled to call upon the remainderman for contribution, and has a lien on the property for the amount due; and that the amount for which the remainderman is liable is the amount paid less the amount of interest which would have been payable by the life tenant. See 16 Cyc. pp. 635, 636; 1 Washburn on Real Property (5th Ed.), p. 129, § 25; *Whitney* v. *Salter*, 36 Minn. 103; *Downing* v. *Hartshorn*, 69 Neb. 364; *Engel* v. *Ladewig*, 153 Mich. 8; *Damm* v. *Damm*, 109 Mich. 619; *Hodges* v. *Phinney*, 106 Mich. 537. And while it is true that a life tenant cannot claim a lien for payments made voluntarily with no purpose to bind the remainderman, yet it is also clear that payments made in ignorance of the real state of facts cannot be said to be voluntary.

This case presents more than the ordinary instance of a payment by a life tenant of an incumbrance. A clear mistake of fact, one of the fundamental grounds of equity jurisdiction, is also involved, and the proposition that inequities resulting from such a mistake as the one in question may be remedied by subrogation is well supported by precedents. In 37 Cyc. pp. 444, 445, it is said:

"Where a person in good faith assumes and pays an encumbrance on land, to which he has no title, but believes in good faith that he is the owner, he becomes the equitable owner of the encumbrance, and the same constitutes a lien on the land; and one who at the time of paying the mortgage debt erroneously believes himself the owner of the property, while in fact the record shows him entitled to but a life estate, is nevertheless

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entitled to subrogation against the remainderman to the extent to which such remainderman was bound to pay the mortgage to protect his estate."

In *Taylor* v. *Roniger*, 147 Mich. 99, Mr. Justice MCALVAY said:

"Complainant purchased the land for $300 cash, understanding that he was obtaining the title in fee subject to the incumbrance. He paid the mortgage thinking he was relieving his own land from the incumbrance, and having paid the mortgage upon the land which in fact he did not own, became its equitable owner, and entitled to be so considered and to have the same declared to be a subsisting lien upon the land."

In *Wilder* v. *Wilder*, 75 Vt. 178, Mr. Wilder, upon the death of his wife, took a life estate in certain real estate belonging to her and occupied as a homestead, while the fee vested in their son in remainder. Mr. Wilder, believing he owned the fee of the property, paid off a mortgage thereon. He further undertook to dispose of the land by his will, one-half to his second wife and one-half to trustees for his son. After his death, the mistake was discovered, and his executrix filed a bill, asking to be subrogated to the rights of the mortgagee under the mortgage so paid. The court granted the relief, saying:

"The fact that he supposed that he held the title to the premises in fee, and made the payment under such belief, did not disentitle him to assert his right as life tenant paying off the incumbrance, to be subrogated to the rights of the mortgagee, to the extent the remainderman was bound to pay to protect his estate. His relation to the estate was such that payment of the mortgage debt by him, without proof of an intention to keep the mortgage on foot, entitled him to be subrogated to the rights of the mortgagee, to the extent we have indicated; and that right may be enforced by the oratrix" (the executrix of his will).

In *Stroh* v. *O'Hearn*, 176 Mich. 164, among other

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complications, certain parties became possessed of life estates under the mistaken, but *bona fide* belief that they owned the fee. In discussing the question of their rights, Mr. Justice STEERE, speaking for this court, said:

"While it was the duty of the remaindermen to prevent foreclosure and save the property, if the life tenants, being under no obligation to do so beyond paying interest, did pay the incumbrances, they would be entitled to call upon the remaindermen for contribution, and would have a lien upon the property for the amount so paid, less interest on the principal of the indebtedness, to be computed against them during the continuance of their life estate."

And again:

"Bauman, having paid the mortgage, or any other lien, on the 60 acres he held as a life tenant, would himself have a lien thereon for the amount paid, deducting interest computed for the estimated duration of his life tenancy."

Considerable argument has been made as to the purpose and intent of Mrs. Gitzen in making the $2,500 payment, and emphasis has been laid on the fact that Mrs. Hennes was a friendly mortgagee, willing to let the mortgage run, and that payment under such circumstances was mere meddling and could not be held to constitute anything but a voluntary payment. But it must be remembered that the mortgage was long overdue, and in the absence of direct proof of an agreement to extend, the presumption would be that payment was demanded, and further, that the payment was made under a mistake of fact, which removes from consideration any possibility of the same being voluntary. When the basis for subrogation is payment under mistake of fact, usually the only essential questions are the right to pay and whether there are any intervening equities that will be prejudiced by allowing subrogation.

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Having made the payment of $2,500 on the original mortgage, then overdue, under the erroneous belief that she was the owner of the fee of the premises, when in fact she had but a life estate, and there being no intervening equities that can be prejudiced, Mrs. Gitzen should, to the extent of such payment, deducting interest for the duration of her life tenancy, be subrogated to the rights of the original mortgagee, as against the remaindermen, since the latter would have been bound to pay the mortgage to protect their estate.

3. Is the plaintiff entitled to subrogation to the rights of Mrs. Hennes under her mortgage by reason of loaning $3,000 to pay the balance of principal of said mortgage under mistake of fact as to the title of the property in question taken as security?

In 37 Cyc. pp. 462, 463, it is said:

"Where an invalid or defective mortgage is given to secure an advancement of money made for the express purpose of paying off a prior encumbrance, the mortgagee in the defective mortgage will be subrogated to the lien of the encumbrance so discharged, in the absence of intervening encumbrances, and mere constructive notice of the invalidity based upon a presumption of knowledge of the law, or upon the recording acts, is not sufficient to prevent the right from attaching if the mortgagee did not have actual knowledge, and the failure of actual knowledge was not *mala fides*."

In *Sproal* v. *Larsen*, 138 Mich. 142, Mr. Justice CARPENTER said:

"There was presented to complainant's attorney an abstract brought down to February 17, 1891, showing title in defendant Augusta. Complainant was led to believe, and did believe, that that title continued in her. He thereupon advanced the money required to pay the money secured by the Gary mortgage, which was accordingly paid, and he obtained a new mortgage on said property, signed by defendant Augusta and her husband. Having subsequently ascertained that defendant Augusta had no title to the mortgaged prop-

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erty, complainant instituted this suit, asking to be subrogated to the rights of the mortgagee in the Gary mortgage. * * *

"Justice MONTGOMERY, speaking for this court (see *Palmer* v. *Sharp*, 112 Mich., at page 423), said:

"'In numerous cases in this State, parties who have accepted securities in good faith upon a loan made for the purpose of discharging existing incumbrances upon the same real estate, have, upon its appearing that the security was ineffectual or invalid, been allowed to be subrogated to the rights of prior lienors; there being no person intervening entitled to superior equities.' (citing cases).

"This principle and these authorities clearly entitle complainant to relief.

"The fact that the property is a homestead does not, as contended by defendants, make the doctrine of subrogation inapplicable. That circumstance did not lessen the rights of the original mortgagee, and therefore does not affect complainant, who, by subrogation, has acquired those rights. * * *

"In the case at bar, complainant's mistake was not one of law. He did not know the facts."

It is true that in the above case there was no interest of a remainderman involved, but in one of the numerous situations involved in *Stroh* v. *O'Hearn*, *supra*, the exact situation here presented was in issue. Mr. Stroh had loaned money to pay off some mortgages on property of the O'Hearn estate, and had taken as security therefor a mortgage, signed by John and Martin O'Hearn, covering a portion of the lands of the estate in which said John and Martin O'Hearn had but a life estate, instead of the absolute title in fee which all the parties concerned honestly believed they owned. In passing on the rights of Mr. Stroh, Mr. Justice STEERE said:

"The mortgages had been foreclosed and sale decreed, and the legacies were past due and payable when Stroh and Bauman first became connected with the

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estate. They were in no way responsible for the conditions which had arisen. Under the apparent necessity of raising money to avoid a sacrifice of the entire estate and meet these pressing obligations, through innocent misrepresentation and a misunderstanding all around as to the condition of titles, they advanced the money to pay off those liens, under the honest belief that they were paying incumbrances on property bought or security taken, based on perfect titles. We think it is within the power of a court of equity to grant them subrogation, subject to such conditions as are just and equitable. They are not arbitrarily entitled to it as a matter of right, irrespective of equitable considerations arising in favor of other interests which may be affected thereby. Subrogation is an equitable doctrine depending upon no contract or privity, and proper to apply whenever persons other than mere volunteers pay a debt or demand which in equity and good conscience should have been satisfied by another. It is proper in all cases to allow it where injustice would follow its denial, and in allowing it all injustice should be guarded against so far as possible. We need not go afield in other jurisdictions for authority upon this subject; the law is well settled in this State. *Detroit Fire & Marine Ins. Co.* v. *Aspinall*, 48 Mich. 238 (12 N. W. 214); *Lockwood* v. *Bassett*, 49 Mich. 546 (14 N. W. 492); *Warner* v. *Hall*, 53 Mich. 371 (19 N. W. 40); *Kelly* v. *Kelly*, 54 Mich. 30 (19 N. W. 580); *White* v. *Newhall*, 68 Mich. 641 (36 N. W. 699); *Palmer* v. *Sharp*, 112 Mich. 420 (70 N. W. 903); *Dayton* v. *Stahl*, 132 Mich. 360 (93 N. W. 878); *Sproal* v. *Larsen*, 138 Mich. 142 (101 N. W. 213); *Taylor* v. *Roniger*, 147 Mich. 99 (110 N. W. 593)."

After discussing the peculiar intermingling of equities due to the complicated facts of that case, he says:

"In granting relief from the consequences of these mistakes, the rights and interests of all parties must be considered. We think it proper, and within the power of a court of chancery, to grant subrogation to Bauman and Stroh to the amount of the liens against the estate which they have paid, less the value of any benefits they may have received from the estate; but the subrogation must be in lieu of that out of which

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the mistakes, which justify the court in granting subrogation asked, arose. * * * With these conveyances canceled and subrogation granted, Stroh and Bauman stand in their relation to the estate as secured creditors only to the amount of the money they advanced in payment of liens against it. Their only right is to have their liens enforced with reasonable diligence."

In the instant case, there are no such intervening equities. When the remainder interest in the Houghton store property vested in the remainderman, it was incumbered by a mortgage of $5,500, the duty of paying which rested on the remainderman. The mortgage was paid by another and discharged under a mistake of fact. If we allow the parties who furnished the money for such payment to be subrogated to the rights of the original mortgagee, the remainderman is thereby left in the identical position he originally occupied, bereft of the inequitable advantage he seeks to retain, but burdened with no incumbrance greater than that which in equity and good conscience he should be required to bear as an incident of the estate which passed to him under the will.

Having loaned the sum of $3,000 for the express purpose of paying off a prior incumbrance on the land taken as security for such loan under a mistake of fact whereby the mortgage became defective, and there being no intervening incumbrances or equities, plaintiff is entitled to be subrogated to the lien of the incumbrance so discharged, to the extent of $3,000.

Inasmuch as Mrs. Gitzen was personally liable on the note and mortgage given by her to the plaintiff, and had personally received the benefit of the loan over and above the $3,000, and her executor has intervened in this case, equity will give the plaintiff a lien on a sufficient portion of the amount to which Mrs. Gitzen is entitled to be subrogated, as above provided, to pay the balance due on plaintiff's mortgage over and above

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the $3,000 to which it is entitled to be subrogated. The plaintiff and intervener, as the equitable assignees of the Hennes mortgage, should have the right to foreclose the same to enforce payment.

Assuming that the amount found due in the decree of the court was determined in accordance with the rules of law herein set forth, the decree of the court below will be affirmed in all respects, with costs to the plaintiff and to the intervener.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

In re DAVIS' ESTATE.

ENGLE *v.* DAVIS' ESTATE.

1. ESTATES OF DECEDENTS — EXECUTORS AND ADMINISTRATORS — CLAIMS—EVIDENCE—ADMISSIBILITY.

On appeal to the circuit court by the administrator from the allowance of a claim against decedent's estate for the amount of a loan claimed to have been made by plaintiff to decedent at the time decedent purchased some land, evidence of the vendor of the land that plaintiff gave him a check in the presence of the deceased, although not at his request, is not open to the objection that it does not tend to show contractual relations between plaintiff and deceased, but, with other evidence, was properly admitted as evidence of the payment.

2. SAME—CORRESPONDENCE—CORROBORATIVE TESTIMONY.

Where disinterested witnesses testified that deceased admitted his indebtedness to plaintiff and stated he had given him a heifer and a hog in payment of the interest,

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letters from deceased to plaintiff referring to the same subject were properly admitted in evidence.

3. NEW TRIAL—GREAT WEIGHT OF EVIDENCE.

On motion for new trial on the ground that the verdict was contrary to the great weight of the evidence, *held*, that the trial court was justified in denying the motion.

Error to Cass; Des Voignes, J. Submitted January 9, 1918. (Docket No. 29.) Decided March 27, 1918.

Benjamin F. Engle presented a claim against the estate of Charles E. Davis, deceased, for money loaned. The claim was allowed in part by the probate judge, and Glenn A. Davis, administrator with the will annexed of the estate, appealed to the circuit court. Judgment for claimant. Contestant brings error. Affirmed.

Chester E. Cone, for appellant.

James H. Kinnane (*Thomas J. Cavanaugh*, of counsel), for appellee.

KUHN, J. Benjamin F. Engle presented a claim against the estate of Charles E. Davis, deceased, in the probate court for the county of Cass, for $1,100, claimed to have been loaned to deceased October 30, 1907, and for $275 interest thereon at 5 per cent. from December, 1911. This claim was allowed at $275 by the judge of probate. From his order so allowing it Glenn A. Davis, administrator with the will annexed of the estate, appealed to the circuit court, and in due course a trial was had in court before a jury, who rendered a verdict in favor of claimant for $1,375. A motion for a new trial was made and denied, judgment was duly entered, and the administrator has brought the matter to this court for review.

The claim of Mr. Engle is that he loaned $1,100 to Charles E. Davis in connection with the closing of a real estate transaction between Davis and wife on

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the one side and Rhoda E. Cutler, William H. Skinner and Samuel F. Skinner on the other, wherein the three last mentioned parties deeded 139 acres of land in Porter township, Cass county, to Charles E. Davis and Ida May Davis, husband and wife, for the stated consideration of $4,782.50, and Davis and wife deeded 40 acres of land in Newberg township, Cass county, to said William H. Skinner and gave a mortgage to said Rhoda E. Cutler and Samuel F. Skinner covering the 139 acres acquired by Davis and wife in the deal.

Ida May Davis died June 6, 1915, prior to the death of her husband, whose decease occurred September 30, 1915, the full title to the 139 acres having devolved upon him by the death of his wife.

Mr. Engle, the claimant, is the father of said Ida May Davis, with whom and his other three children he had had some business transactions in connection with the settlement of the estate of his wife, Mary L. Engle, of which he was the executor.

No note or other writing was taken by Mr. Engle to evidence the loan of this $1,100, and because of the statute preventing him from testifying to any facts equally within the knowledge of the deceased, it is claimed that the only proof he was able to introduce to establish his claim was of a fragmentary, indefinite and unsatisfactory nature. It is the further claim of appellant that the proof introduced might have applied equally well to advances of money to, and other transactions with, his daughter under arrangements in connection with his wife's estate and otherwise, and that much of the evidence offered should have been excluded on the ground that claimant was unable to connect it in any way with the claim in question. This much was established, however, that Mr. Engle met the parties to the real estate deal referred to, at the court house in Cassopolis; that he had $1,100 before the deal was closed which he did not have after-

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wards, and that he turned over a draft for $1,100 to Mr. Skinner.

The first contention of appellant's counsel is that the testimony of the witness Samuel F. Skinner was improperly admitted. This witness testified that he was present on October 30, 1907, when Mr. Engle gave him a check for $1,100 in the presence of Mr. Davis. It is claimed that he does not testify that he gave him the money at the request of Davis, and therefore it does not tend to show any contractual relation between Engle and Davis. If this were the sole evidence in the case, it might be subject to the criticism made, but when considered with all the other testimony, we think it was properly admitted as evidence of the payment.

Similar objection is made to certain letters which were admitted in evidence, written by the deceased to the claimant, and which, in connection with the testimony of the witnesses, were admitted for the purpose of showing that the loan was made and that it had been kept alive by payments and by acknowledgments in writing. Witness Mattie Mihills testified that she was present at a conversation had in front of Mr. Davis' house, in which it is claimed the following occurred:

"Mr. Davis said that he had got $1100 of father Engle and he had let him—he would expect to pay him when he got around so he could.

"*Q.* What did he say as to whether he was paying interest or not?

"*A.* Why he said he hadn't paid him interest quite lately; he didn't have it to pay.

"*Q.* Did he say anything about having paid some interest at some time?

"*A.* Why he spoke about letting him have some cattle.

"*Q.* A heifer?

"*A.* Yes, sir, and a hog.

"*Q.* State what he said as to whether that paid interest or not.

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"*A.* Paid it on towards interest.

"*Q.* About how long after that was it that Charles died?

"*A.* About two months probably, two and a half."

Her husband, who was also present, stated that he heard Mr. Davis say that Mr. Engle, the claimant, had let him have $1,100, and that he might as well pay interest to him as anybody else. The letters in question refer to the transaction with reference to the heifer and the hog, and we see no error in admitting them for the purposes above stated.

It is further suggested that the verdict of the jury was contrary to the weight of the evidence and that the circuit judge erred in not granting a new trial for that reason. The learned trial judge in denying the motion said:

"The reason assigned, that a directed verdict should have been given, is answered in the discussion under the assignment first reciting the testimony introduced on the part of both parties in this case, clearly indicating that there was enough to take to the jury, providing the original indebtedness was not barred by the statute of limitations.

"My reason for submitting it to the jury on that relation was, first, there was evidence of payment and the written acknowledgment of the indebtedness. It is not disputed that Mr. Engle advanced eleven hundred dollars. The question for determination was, Was this a gift, or was it a loan?

"Davis between December 9, 1911, and March 20, 1912, turned out to Mr. Engle a heifer and a boar to pay interest evidently due October 30, 1911, on this loan. In the letter of December 25, 1911, Mr. Davis speaks of the boar, and tells Mr. Engle that if he concludes he does not need the boar, he, Engle, can have him on the same terms that he took the heifer, and concludes the paragraph by saying, 'It is as good as cash to me.'

"Mrs. Mihills testified that Davis told her that he had let Engle have a heifer and a hog on the interest on the indebtedness. This testimony, if true, indicated

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a revival of the indebtedness as late as the latter part of the year 1911."

We agree with his conclusion that there was sufficient evidence to warrant the submission of the disputed questions of fact to the jury, and we are not satisfied that there is not enough evidence to support the verdict, so as to justify us in disturbing the action of the trial judge in denying the motion for a new trial.

We conclude that the judgment should be, and it is hereby affirmed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

PEOPLE *v.* MULLIS.

1. RECEIVING STOLEN GOODS — CRIMINAL LAW — INSTRUCTIONS — TRIAL.

   In a prosecution for receiving stolen property, an instruction by the court that the place "where the offense was committed" was not in dispute, was not prejudicial error because he failed to use the word "alleged" before the word "offense."

2. SAME—QUESTION OF LAW.

   Undisputed testimony of a witness that he stole the goods defendant was charged with receiving, justified the trial court in instructing the jury that there was no dispute that they were stolen.

3. SAME.

   Defendant having testified that the stolen goods were worth over $25, and there being no testimony to the contrary,

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the court was not in error in instructing the jury that it was admitted that the value was over $25.

4. SAME—GUILTY KNOWLEDGE.

On the question of guilty knowledge of defendant, the court was not in error in charging the jury that "His possession must be regarded as innocent, unless shown to have been received with knowledge that they were stolen, or under circumstances which would satisfy the jury that he believed them to be stolen."

Error to superior court of Grand Rapids; Brown, J., presiding. Submitted January 17, 1918. (Docket No. 191.) Decided March 27, 1918.

Sam Mullis was convicted of receiving stolen goods and sentenced to imprisonment for not less than six months nor more than five years in the State reformatory at Ionia. Affirmed.

Herman & Johnson, for appellant.

Cornelius Hoffius, Prosecuting Attorney, and *Fred P. Geib*, Assistant Prosecuting Attorney, for the people.

KUHN, J. The respondent was convicted on an information which charged that he did, on the 21st day of February, 1917, in the city of Grand Rapids, receive eight automobile tires, of the value of $108, which had previously been stolen, and that he well knew at the time that the goods had been stolen. One Miller Burleigh had previously pleaded guilty to the larceny of the tires which he had sold to the respondent, and appeared as a witness for the people in this case. Sentence was pronounced.

The questions raised by the assignments of error relate entirely to the charge of the court, and, in general, it is the claim of the respondent that the charge of the court was so prejudicial to the rights of the respondent that he did not have a fair trial, and that,

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therefore, his conviction should be set aside and a new trial granted.

Counsel for the respondent state their position as follows:

"By the various assignments of error in this case we have sought to point out various specific instances wherein the court erred. While any one of the assignments, considered alone, might not be of sufficient importance to warrant the vacating of the verdict, still we are fully convinced that all of them, considered as a whole, will bring this court to an irresistible conclusion that this respondent was denied a fair and impartial trial."

The court, at the beginning of its charge, said:

"The elements which constitute this offense are, first: You establish the place where the offense was committed. That was in the city of Grand Rapids and is not disputed."

It is claimed that this was grievous and prejudicial error on the part of the court, in that the court failed to use the word "alleged" before the word "offense," and that in effect the court, in its opinion, was stating to the jury that the crime had been committed. However, a reading of the excerpt clearly shows that the court was referring to the place of the crime as one of the elements necessary to be proven, and stated that this was undisputed. As it clearly appears from the record that there was no dispute that the crime, if committed, took place in Grand Rapids, we see no prejevidence showed beyond a reasonable doubt that the the court.

Again the court said:

"The tires in question were stolen. Under the testimony in this case and under the admission of counsel, there is no dispute about that, that these tires were stolen by Burleigh."

It is the contention of counsel for appellant that the

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court should have left it to the jury to find whether the udicial harm to the respondent in the language of tires were stolen. That they were stolen is shown by Burleigh, the man who pleaded guilty to the larceny, and no contention was made by the respondent, or any witness, that this was not the fact. It being an undisputed fact, we do not see how it can be said to be reversible error for the court to have so instructed the jury.

The court further said:

"That they were of the value of over twenty-five dollars. That is also admitted by the defense in this case. Ordinarily as to whether or not the value is over twenty-five dollars, or twenty-five dollars or less, becomes an important issue in a case, but in this case the tires are admitted to be of the value of over twenty-five dollars at the time, so there is no dispute about that."

Again the record is very clear, according to the undisputed evidence, that the tires were worth over $25. No testimony is referred to by counsel for appellant to justify the claim that there was any evidence that the value of the tires was $25, or less than that amount. In fact, the respondent himself testified that they were worth over $25. We are therefore of the opinion that there was no prejudicial error in charging the jury as the court did with reference to the value of the tires.

The court, after stating the elements of the offense, limited the issue to the single question of guilty knowledge, and the court proceeded to explain what established guilty knowledge, as follows:

"So there may be some question in your minds as to what establishes knowledge. When can you be said to know a thing, and when don't you know it? That is a matter that receives a great deal of attention, but in this case of *Durant* v. *People*, 13 Mich. 353, I think is a definition that I have just read: 'Her possession

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must be regarded as innocent, unless shown to have been received with knowledge that they were stolen, or under circumstances which would satisfy the jury that she believed them to be stolen.' "

We see no error in this, as the court followed the language in the case referred to, which decision justified the use of the language criticized by respondent's counsel.

A reading of the charge shows that the court fully explained to the jury the necessity of the people proving their claim beyond a reasonable doubt, the presumption of innocence, that the burden of proof rested upon the people and continued upon the people throughout the trial, that the jury were at liberty to disregard the testimony of any witness that had sworn falsely upon any material fact, and that the jury were the sole judges of the evidence.

The respondent had a fair trial, and none of the assignments of error satisfies us that prejudicial error was committed by the court in his charge submitting the case to the jury. The conviction and judgment of the court must therefore be affirmed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

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DIER *v.* VOORHEES.

NEGLIGENCE — AUTOMOBILES — CONTRIBUTORY NEGLIGENCE — DEATH ACT—QUESTION FOR JURY.

In an action under the death act for the negligent killing of plaintiff's decedent by collision with a runaway horse frightened by collision with defendant's automobile, where the evidence shows that decedent was riding north, on a bicycle, on the east side of the street, and, because of a head wind, was riding with his head down and failed to see the horse coming, he was not, as a matter of law, guilty of contributory negligence.

Error to Ingham; Wiest, J. Submitted January 8, 1918. (Docket No. 4.) Decided March 27, 1918.

Case by Augusta Dier, administratrix of the estate of Rudolph Dier, deceased, against J. Martin Voorhees for the negligent killing of plaintiff's intestate. Judgment for plaintiff. Defendant brings error. Affirmed.

Person, Thomas, Shields & Silsbee, for appellant.

W. F. Steinkohl (*Walter I. McKenzie* and *Cummins & Nichols,* of counsel), for appellee.

KUHN, J. On March 2, 1915, one Frank H. Green was driving a covered laundry wagon, drawn by one horse, in an easterly direction along Main street west, in the city of Lansing, and when about 200 feet west of the corner of Main street and Washington avenue, his wagon was struck by an automobile, driven by the defendant, J. Martin Voorhees, who had come up behind the laundry wagon and was attempting to pass it, going in the same direction on Main street. The collision dished a wheel of the wagon, broke the thills, otherwise damaged it, and moreover frightened the

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horse, which ran away and, at the intersection of Main street and Washington avenue, turned south on the latter street, along which it ran for about four blocks with the wagon still attached, when the driver, Green, was thrown from the wagon, the horse became detached therefrom, and, continuing south on Washington avenue, at a point not far from the intersection of South street, ran into plaintiff's intestate, Rudolph Dier, who was riding a bicycle north along the easterly side of Washington avenue. By this collision Mr. Dier was thrown from his bicycle and instantly killed.

The testimony showed that the horse, after turning onto Washington avenue, kept to the westerly side of the street until he reached a point five or six rods north of South street, where he swerved and crossed the street at quite a sharp angle, and then proceeded south on the easterly side a short distance before the collision, which occurred about ten feet north of the crosswalk of South street. The accident happened a few minutes after 11:30 a. m., while the employees of the Reo factory were coming north on Washington avenue on their way home for the noon hour, many of them on bicycles. Mr. Dier was near the head of the crowd, however, and the testimony was to the effect that there was nothing to shut the horse from his view from the time it was six rods north of South street on the other side till it ran into him. It was a windy day. Mr. Dier had his head down, appeared to be looking down; but two of the witnesses thought he saw the horse a few seconds before it struck him and tried to turn his bicycle toward the curb. While there was some noise on the street, one witness testified that, when he was crossing South street on the east side of Washington avenue, his attention was attracted to the horse, then about seven or eight rods north of South street, on the other side of Washington, by the clatter of its hoofs.

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Plaintiff brought suit, under the death act, against Frank H. Green and J. Martin Voorhees, but, on the trial, proceedings were not pressed as to defendant Green. Some testimony was introduced on behalf of defendant Voorhees, and at the conclusion of the trial he moved the court to direct a verdict in his favor on the ground of contributory negligence on the part of plaintiff's intestate. This the court refused to do, and a verdict was rendered in favor of plaintiff for $2,500, whereupon defendant asked the court to enter judgment in his favor notwithstanding the verdict, under Act No. 217, Pub. Acts 1915 (3 Comp. Laws 1915, § 14568 *et seq.*). This motion was also denied.

The sole contention made by the appellant's counsel is that the court erred in refusing to direct a verdict in favor of the defendant for the reason that, as a matter of law, the plaintiff's decedent, under the facts, was guilty of contributory negligence. In the consideration of this question it should be borne in mind that plaintiff's decedent had crossed South street and that Washington avenue, at the point of the accident, is a paved street with double tracks in the center. As is customary, where streets are divided by tracks in this way, traffic divides into two streams, each occupying the right hand side of the street in the direction it is going. Under these circumstances, there was clearly no reason for the plaintiff to look out for vehicles going south on the east side of the street, for, under such circumstances, a vehicle going in that direction would be going counter to the stream of the traffic. Should plaintiff's decedent, as a reasonably prudent man, under these circumstances, be held to have had in his mind the danger of runaway horses or vehicles not under control? The question of negligence in this case, as in all cases, is to be decided upon the facts of the particular case. We are not of the opinion that it can be said that the decedent was guilty of negligence as a matter

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of law because he did not see the runaway horse which came down on the other side of the street until almost opposite him and then crossed abruptly over to his side. The cases cited by counsel for appellant are cases where the plaintiff went into places of known danger, such as street intersections, or attempted to cross streets where traffic was the usual and expected thing, without looking to see whether the way was clear. In this line of cases it has been held that, where a person fails to guard against dangers well known as usual and likely to occur, and which ordinarily prudent men would guard against, he should be held guilty of contributory negligence. Of this class are the recent cases of *Tolmie* v. *Taxicab Co.*, 178 Mich. 426, and *Ude* v. *Fuller*, 187 Mich. 483. The situation here presented, however, is entirely different and easily distinguishable from the cases relied upon. We think that the conduct of the plaintiff's decedent was such as to warrant the jury in finding that he acted as a reasonably prudent man would have acted under the circumstances. See *Jordan* v. *LeMessurier*, 155 Mich. 188, and *Winckowski* v. *Dodge*, 183 Mich. 303.

The learned trial judge did not err in deciding that this question was not one of law and acted properly in submitting it to the jury. The judgment should be, and therefore is, hereby affirmed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

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JAMESON *v.* WALTER S. NEWHALL CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DISABILITY—AMOUNT OF COMPENSATION.
   Under the workmen's compensation act, an injured employee's right to compensation is to be tested by his ability to earn at the same employment in which he was employed when injured. Section 11, part 2, Act No. 10, Extra Session 1912 (2 Comp. Laws 1915, § 5441).

2. SAME—COMPENSATION—AWARD BY INDUSTRIAL ACCIDENT BOARD.
   An award by the industrial accident board of total disability, with the proviso that, should plaintiff become only partially incapacitated he should receive compensation at the rate of one-half the difference between his average weekly wage before the injury and the average weekly wage he is able to earn during the period of his partial disability, was justified under section 11, part 2, of the workmen's compensation act (2 Comp. Laws 1915, § 5441), where the evidence showed that plaintiff was physically incapacitated from following his former employment as an expert pile driver.

Certiorari to Industrial Accident Board. Submitted January 22, 1918. (Docket No. 153.) Decided March 27, 1918. Rehearing denied June 20, 1918.

Berton Jameson presented his claim for compensation against the Walter S. Newhall Company for injuries received in defendant's employ. From an order awarding compensation, defendant and the Fidelity & Casualty Company, insurer, bring certiorari. Affirmed.

Guy W. Moore and *Hal P. Wilson*, for appellant.

Person, Thomas, Shields & Silsbee, for appellee.

KUHN, J. On April 17, 1916, the applicant, Bert (or Berton) Jameson, was in the employ of the re-

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spondent Walter S. Newhall Company as foreman of certain pile driving operations in connection with the construction of an ore dock at Zug Island, and on the morning of that day, while he was engaged in superintending the moving of a pile driver, the pile hammer was lowered in such a manner that it struck one end of a plank and hurled the other end violently against the right side of his face. The impact rendered him unconscious, fractured the right side of his jaw, destroyed nearly all his teeth, cut a large gash in his right cheek, severed certain facial nerves resulting in paralysis of a portion of the right side of his face and caused a partial ankylosis of the jaw, leaving him with impaired sight and hearing, subject to dizzy spells, and permanently weakened physically. He can now open his jaw only about three-fourths of an inch and it is impossible, for this reason, to fit him with artificial teeth.

Prior to the accident he was a strong, vigorous man, capable of performing heavy physical labor and able to engage in occupations of a dangerous character. He had expert knowledge of the construction and operation of derricks and other machinery used in construction work and a long experience in that line of employment. It is admitted that pile driving requires physical labor of a very heavy kind, such as the handling of immense timbers, etc., and is moreover a dangerous occupation, not only because of the clumsy and ponderous apparatus used therein, but also because it involves the climbing to, and working at, considerable heights, requiring a clear head and steady nerves. The testimony showed that a capable foreman in this line of work should, and that Mr. Jameson did, take an active part in the heavy lifting and in the dangerous part of the work; that he usually set the timbers himself, had tackles to handle, and personally climbed to the top of the pile driver when

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necessary to adjust the apparatus there. His work included the repairing of the pile driver and other machinery. Since the accident, applicant has been unable to resume this line of work, partly because he is greatly weakened by reason of insufficient nourishment, his injury having made it impossible for him to masticate food, and partly because he is now subject to dizzy spells when he attempts to climb to any height and whenever he stoops over. The superintendent of the Newhall Company testified:

"I would hesitate to put him in charge of a pile driver crew, or in charge of a crew doing what he was doing the day he was hurt. I would hesitate for two reasons, and the first is physical inability to handle it properly, and the fact is that most always when a man goes through experiences of that kind, he loses his nerve for work of a similar character. * * * The machine he was handling was about 65 feet high, and weighed 9,000 pounds, and it requires a man of full judgment and more or less daring to handle equipment of that sort successfully."

Ten weeks after the accident Mr. Jameson had recovered sufficiently to be able to do light work and was given employment by respondent, first as foreman of an excavating gang, involving no physical labor, then as carpenter foreman in connection with some timber work on the dock, later as foreman or superintendent of some concrete bridge construction work near Warren, and afterwards at respondent's carpenter department in North Detroit for about three weeks, the last three positions requiring some light physical labor on his part. Since April or May, 1917, he has had no further employment by respondent, and, up to the time of taking the testimony, in September, 1917, only about three weeks' work, as a carpenter foreman, for another construction company.

At the time of the accident, applicant was earning $4.75 per day, working 10 hours a day and six days

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per week. When he first went back to work, 10 weeks after his injury, the company paid him $4.50 per 10-hour day for the lighter and less responsible employment they then gave him, and when they made him foreman of the carpenter work on the dock, they increased his wages to $5 per day of 10 hours. He also received this same wage for his bridge work at Warren and the shop carpenter work at North Detroit. Wages generally had increased in the meantime.

Both applicant and respondent were under the workmen's compensation act at the time of the accident, and applicant's claim for compensation was, by stipulation, heard before Mr. Ora E. Reaves, deputy commissioner, as sole arbitrator. He awarded $10 per week for the period of 10 weeks for total disability, and for partial disability from the date of applicant's return to work to date of hearing, 75 cents per week, and thereafter one-half the difference between his wage before the accident and what he might earn in the future. Both parties appealed to the full board, who, after hearing, ruled that claimant was totally disabled within the meaning of the act, and granted compensation at the rate of $10 per week, with the proviso, however, that if applicant should become only partially incapacitated, he should receive compensation at the rate of one-half the difference between his average weekly wage before the injury and the average weekly wage he is able to earn during the period of his partial disability.

The last sentence of section 11, part 2, of the workmen's compensation act, being section 5441, 2 Comp. Laws 1915, is as follows:

"The weekly loss in wages referred to in this act shall consist of such percentage of the average weekly earnings of the injured employee, computed according to the provisions of this section, as shall fairly represent the proportionate extent of the impairment

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of his earning capacity in the employment in which he was working at the time of the accident, the same to be fixed as of the time of the accident, but to be determined in view of the nature and extent of the injury."

It is the contention of the respondent and appellant that the board erred in holding that the claimant was permanently disabled because of the fact that he was unable to engage in the specific and identical work that he was engaged in at the time of his injury, and to give the law this construction would result in great inequity. It is the contention of counsel for claimant that the question here presented has been squarely ruled upon in the case of *Foley* v. *Railway*, 190 Mich. 507. At page 515, Mr. Justice STEERE, speaking for the court, in referring to the language of section 11, above set forth, said:

"The language of this last provision is plain, and has but one obvious meaning, designating as the test capacity to earn in the same employment in which the employee was injured. That under this rule instances may arise where it works inequitably, does not authorize the court to read exceptions into it or modify its plain language defining the basis for estimating incapacity, which at best can only be approximated. If the method ought to be changed or exceptional cases provided for, the remedy rests with the legislature."

Counsel for the appellee does not insist that the test in this case should be that the injured man must be able to pursue the identical act in which he was engaged at the time of his injury, but that the facts here presented conclusively show that the claimant cannot pursue *the same kind of employment* as he did before the accident, that is, being an expert pile driver. In this contention we think that counsel for claimant is clearly right. The serious character of the injuries here undisputed clearly shows that the claimant is physically incapacitated from pursuing the

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employment in which he was engaged at the time of this accident, and that therefore the case comes, as contended, squarely within the ruling of the *Foley Case, supra.* We see no escape from the conclusion that the industrial accident board was right in so holding, and therefore affirm the award made by them.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

FLEMING v. JAMES S. HOLDEN CO.

BROKERS—COMMISSIONS — WRITTEN CONTRACTS — PERFORMANCE — QUESTION OF LAW.

In an action by a real estate broker for commissions on the leasing of land, where the undisputed testimony showed that the terms of the contract, which was in writing as required by section 11981, 3 Comp. Laws 1915, had not been met by the plaintiff, the court below properly directed a verdict in favor of defendant, and such action is not open to the objection that plaintiff was thereby deprived of a trial by jury.

Error to Wayne; Mandell, J. Submitted January 23, 1918. (Docket No. 28.) Decided March 27, 1918.

Assumpsit by John H. Fleming against the James S. Holden Company for the recovery of a commission for the leasing of land. Judgment for defendant. Plaintiff brings error. Affirmed.

Wilkinson, Routier & Hinkley, for appellant.

Stevenson, Carpenter, Butzel & Backus (*Thomas G. Long,* of counsel), for appellee.

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BROOKE, J. This action is brought by one real estate broker against another real estate broker for the recovery of a commission for the leasing of land. In 1914, the Capitol Square Building Company was in possession of a 99-year lease of a building known as the Bamlet building, at the corner of Grand River avenue and Griswold street, in the city of Detroit, which they held as sublessee from the original lessee. The lease had still 97 years to run, and the Capitol Square Building Company, being desirous of subleasing the building for the balance of the term, placed it with the defendant, James S. Holden Company, another corporation. The plaintiff secured from the James S. Holden Company the following contract of employment:

"JAMES S. HOLDEN CO.
"Real Estate
"Building, Fire Insurance, Loans,
"1102 Penobscot Building.
"DETROIT, MICH., Sept. 8, 1914.

"MR. JOHN H. FLEMING,
"Detroit, Mich.

"*Dear Sir:* If a lease is made with Robert Williamson for the Bamlet building, corner of Grand River avenue and Griswold street, within a reasonable time, for a period of ninety-seven years, more or less, at terms and conditions satisfactory to the Capitol Square Building Company, we will pay you a commission of $5,000.00.

"Very truly yours,
"JAMES S. HOLDEN COMPANY,
"JAMES S. HOLDEN, President.

"JSH/EY
"Signed Sept. 9, 1914. $500 paid down by R. Williamson to Jas. S. Holden Company.
"G. D. HART."

It is the claim of plaintiff that the president of the defendant company, Mr. James S. Holden, also delivered to plaintiff a written memorandum in his own handwriting containing the terms and conditions of

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the proposed lease. The original memorandum could not be found, but a copy of it was introduced. After securing the contract and the memorandum, the plaintiff entered into negotiations with George C. Hart, a real estate broker, who had a client named Robert Williamson, who was looking for the building. It is the claim of the plaintiff that the terms of the lease were satisfactory to Williamson, and a conference was arranged between the parties and Williamson expressed himself as satisfied with the terms and conditions as submitted, and deposited with Mr. Holden, as good faith of his intention to carry out the lease, the sum of $500, and Mr. Holden was also informed when the papers were to be prepared—October 1, 1914—and the building turned over for occupancy. Williamson was immediately permitted to occupy the premises, and he started to make certain alterations and repairs, and remained in possession about three weeks, but it does not appear under what conditions or agreement Mr. Williamson went into possession and did this work. Attorneys representing both parties set about drafting the lease. Mr. Backus, one of the witnesses connected with drafting the lease, testified as to these negotiations regarding the lease with Mr. Duffield, representing Williamson, as follows:

"The lease was agreed upon between Mr. Duffield and myself as being satisfactory in form on October 8th. There were several changes made in the draft which we had before us at that time and we decided to retypewrite it and it was retyped in my office and handed back to Mr. Duffield on October 12th, which was Monday, and would have been handed to him sooner if it had not been for an intervening holiday."

The lease was never signed, and the reason for this action is given by Mr. Holden as follows:

"I remember when the last draft or whatever it was, he (Mr. Williamson) came in and said, 'I have a draft of the lease as the attorneys have agreed upon

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and I want a few days to look it over,' and the next I knew I was summoned over at a conference in Mr. Duffield's office and he said he was not satisfied because he had not been able to close it by the 1st of October."

Upon the trial of the case, after the taking of testimony had proceeded a short time, the judge dismissed the jury, stating that he thought there was nothing but a question of law involved, saying:

"I will hear all of your proofs now, then later determine whether I will call any jury to aid in the determination of the question of fact."

It is urged that, by this action of the trial judge, the plaintiff was deprived of a trial by jury. We are not impressed that there is any merit to this claim. The right to the commission here claimed is required by law to be evidenced by writing. Act No. 238, Pub. Acts 1913, § 2, subd. 5 (3 Comp. Laws 1915, § 11981); *Smith* v. *Starke*, 196 Mich. 311. Plaintiff's right of action is based upon the offer of payment in the letter above set forth, and it must be governed by the terms of that letter. It is therein expressly stated that the commission was only to be paid "if a lease is made with Robert Williamson * * * at terms and conditions satisfactory to the Capitol Square Building Company." We think it clearly appears that plaintiff has no standing in this case because a lease was never made, nor does it appear that Mr. Williamson was ready and willing to accept a lease on terms and conditions satisfactory to the Capitol Square Building Company. In the case before us the defendant was not the prospective lessor and cannot be said to have been in any way responsible for the conduct of such a prospective lessor. If the building company had absolutely and wrongfully refused to go any further with the transaction, under the terms of this offer, the defendant, James S. Holden Company, would not have been liable

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for a commission. Neither could the defendant control the making or the not making of a lease, and therefore it was a very reasonable limitation to the right of recovering a commission that a lease was to be made before such a claim could accrue. Neither one of these two conditions having been met by the plaintiff, it follows that there was no liability on the part of the defendant, and the trial judge acted properly in directing a verdict for the defendant.

The judgment is affirmed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, FELLOWS, and STONE, JJ., concurred. KUHN, J., did not sit.

WOODWARD v. HURON IMPLEMENT CO.

1. APPEAL AND ERROR—REVIEW.

   In an action for fraud, commenced by writ of attachment, where the judgment of no cause of action is sustained by the appellate court, it will be unnecessary to review the action of the court below in dissolving the writ of attachment.

2. FRAUD—EVIDENCE—CLEAR WEIGHT OF EVIDENCE—FINDINGS OF COURT—REVIEW.

   In an action for fraud in the transfer of plaintiff's business, evidence examined, and *held*, that the findings of the court below were not against the clear weight of the evidence requiring a reversal of the judgment under section 12587, 3 Comp. Laws 1915.

Error to Huron; Beach, J. Submitted January 16, 1918. (Docket No. 94.) Decided March 27, 1918.

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Assumpsit by Frank L. Woodward against the Huron Implement Company upon a contract alleged to have been obtained by fraud and deceit. Judgment for defendant. Plaintiff brings error. Affirmed.

A. F. Freeman, for appellant.

W. T. Bope, for appellee.

KUHN, J. Plaintiff has brought an action of assumpsit, based on alleged fraud on the part of defendant through its agents and directors, both in omitting, in connection with a certain offer submitted to plaintiff, to disclose material facts, and also in making certain promises or representations, whereby plaintiff was induced to enter into a contract arrangement with defendant, pursuant to which he transferred to it his foundry business, stock of materials, tools, etc., and received therefor $10,000 in common stock of defendant corporation and was made general manager of the combined enterprises, as a result of which fraudulent inducement, and the subsequent conduct of defendant and its agents, plaintiff has sustained the loss of the entire property invested. Plaintiff has claimed a rescission of the contract, resigned as general manager and director, tendered back his holding of stock, and seeks to recover the value of the property which he turned over to the corporation. The suit was commenced by writ of attachment, based on the ground that defendant "fraudulently contracted the debt, or incurred the obligation respecting which the suit is brought." The declaration consists of the common counts, with notice setting up the nature of plaintiff's claim.

Upon a trial on the merits before the court without a jury, the trial judge made the following findings of fact and conclusions of law:

"That in the fall of 1915, a company of Bad Axe

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persons assumed to be a corporation owning a manufacturing plant and a business in the city of Bad Axe, the business of which was the manufacture and sale of a special cultivator under a patent; that the business had not flourished and was at a standstill.

"Mr. John Ryan, a stockholder, was informed by a mutual acquaintance of Mr. Woodward and his business at Clinton, Michigan. Mr. Woodward's business was the manufacture of plows and plow repairs, and for that purpose he owned a foundry and equipment. Correspondence and negotiations followed, which resulted in a reorganization of the Huron Implement Corporation with an additional capital stock, a transfer to the new corporation of Mr. Woodward's foundry, material, matters, etc., at a valuation of $10,000, Mr. Woodward receiving thereafter $10,000 in the common stock of the reorganization.

"A contract was entered into by which Mr. Woodward became manager at a salary of $125 per month for the first year and $100 the second year, with a provision for increase if the business paid a certain per cent profit.

"During these negotiations, Mr. Ryan and Mr. Pangborn visited and inspected Mr. Woodward's property at Clinton and Mr. Woodward was given a free hand at Bad Axe for investigation and to size up the prospects of making a success of the business and to investigate the assets of the business.

"Mr. Woodward assumed management of the business. A stock of completed implements and parts and unfinished implements was on hand, and Mr. Woodward devoted his attention to getting these on the market and finishing the uncompleted implements.

"In the negotiations and meetings of the stockholders of the new corporation, there seems to be no doubt that the addition of Mr. Woodward's plow business to the corporation was to be made effective by a suitable building to house it and carry on the work, and plans were formulated for the building and estimates of cost made.

"Mr. Woodward assumed management March 1, 1916. In April, three of the directors, Mr. Ryan, Mr. Fremont, and Mr. Pangborn, had a conversation with Mr. Woodward, in which they insisted that work on

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the foundry building should be postponed until August. In the meantime a part of Mr. Woodward's foundry equipment had been delivered at the grounds of the company at Bad Axe, the remainder awaiting at Clinton the completion of the building. The completed cultivators were put upon the market and a salesman was employed.

"At the reorganization, cash on hand from stock subscriptions was $9,500 approximately. The indebtedness of the old corporation assumed by the new was approximately $5,500.

"About October, 1916, the bank of F. W. Hubbard & Company, of which Mr. Ryan, a director of the corporation, was manager, notified Mr. Woodward not to overdraw the Implement Company's account, which was then about exhausted. No work had been commenced on the foundry building.

"A part of the indebtedness of the old corporation, not including the $3,000 secured by the real estate, was paid by checks drawn on the funds by Mr. Rankin, cashier of the F. W. Hubbard bank, by direction of the directors of the corporation.

"About ..... 1916, Mr. Woodward, after interviews and negotiations with Mr. Ryan and the stockholders and directors in session, resigned his position of manager, tendered back his stock and brought this action.

"When the active operation of the business came to a stop, the condition of the corporation was about the same as when operations commenced, so far as indebtedness and inventory value of assets were concerned, except that the cash from the stock subscription and from the proceeds of such sales as were collected, had been invested in material and labor.

"These, I believe, are the essential and material undisputed facts. The disputed facts are:

"*First.* Mr. Woodward claims that he was misinformed in the negotiations as to the amount of floating debts, over and above that secured by the real estate, which he claims were roughly estimated at four or five hundred dollars. Mr. Ryan and Mr. Pangborn both deny this and state positively that the actual amount of debts was overstated to Mr. Woodward.

"From a preponderance of the testimony and the

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circumstances, I find as a matter of fact, that the full amount of debt was communicated to Mr. Woodward before he became a stockholder.

"*Second.* A claim is made that a part of the inducement to Mr. Woodward, to close the contract for service and transfer of his foundry equipment, was a representation or promise by influential and wealthy subscribers to the new stock, that sufficient funds would be forthcoming to finance the business and erect the foundry, and the failure of the directorate to supply funds when the cash was exhausted, is evidently, as I gather from the mass of testimony and argument, claimed to constitute a breach of contract, express or implied, upon which plaintiff relies as the fraud and tort as a basis of his suit; coupled with the claim in finding number one, as to the misrepresentations as to indebtedness.

"The testimony in this connection is in conflict, Mr. Woodward claiming that what was said was by those authorized by their positions and influence in the corporation and induced him to close the contract. The opposing testimony is in substance that the statements made were that the banks, of one of which Mr. Ryan was manager, and of the other, Mr. Sleeper was a large proprietor—both those men being stockholders in the corporation, would furnish credit if the corporation's business warranted credit.

"I find that there was no express, unconditional promise or representation by the corporation, through any one authorized to make such a promise, that more funds would be furnished than the cash capital on hand.

"*Third.* I find that Mr. Woodward was given complete authority as manager, at the start, with unrestricted use of the funds on hand, except the amount expended in settling the floating indebtedness by the checks signed by Mr. Rankin.

"*Fourth.* The cause for the instructions to postpone the commencement of building operations until August, does not appear clearly in the testimony, except that it may be inferred that the funds were being depleted and the business not satisfactory, and that it was a precaution against further financial difficulties. Also early in the spring the ground was too wet to permit building operations.

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"*Fifth.* I find that Mr. Woodward entered into this contract with as much practical knowledge as to whether it could be made a paying business as the influential stockholders. The bankruptcy proceedings were not started until after this suit was started by plaintiff.

"Conclusions of Law.

"*First.* The testimony does not warrant (and the burden of proof is not sustained by plaintiff in this respect), the conclusion that active fraud was practiced by any one in the negotiations preceding the contract, and the plaintiff's declaration disavows such active fraud.

"*Second.* Was there constructive fraud in the breach of an implied promise to continue operations and furnish funds?

"I do not think that a promise can be fairly implied, as a matter of law, to continue a business as to which the parties may have had roseate views, both the incorporators and Mr. Woodward, when conditions unforeseen, faulty management or numerous other business difficulties shall confront such an organization with financial ruin. The testimony is bare as to what was to follow the step, whether to resume after a time, sell more stock or wind up. The bankruptcy proceedings can hardly relate back to the original negotiations, nor to the stoppage of credit and operations, to give any fraudulent color to those transactions.

"*Third.* I find no ulterior intention or motive in the stoppage of credit and operations toward Mr. Woodward or his interest, no misfeasance. At most, if he should be found to have suffered a loss, it is the result of mere nonfeasance and I am not sure that mere nonfeasance can not support a tort action, and it is difficult to say that the refusal of credit and stoppage was not good business sense.

"An order will be entered on these findings, dissolving the writ of attachment, restoring the property to the defendant and assignee in bankruptcy.

"As I understand, the whole merits of the cause of action were submitted, and testimony to apply to the same, the motion to dismiss the action is sustained and an order will be entered to that effect."

A motion for a new trial was denied by the circuit

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judge, who, at plaintiff's request, filed his reasons therefor in writing. Plaintiff filed exceptions to the refusal to grant a new trial and also to the court's findings of fact, on the ground that such findings are against the clear weight of evidence submitted at the trial.

It will be noted from the findings of the court that an order dissolving the writ of attachment was provided for and also that the case was decided upon its merits. Thereafter an order dissolving the attachment was entered and also a judgment of no cause of action. There is some discussion in the briefs of counsel as to whether the order dissolving the attachment is properly before us for review, but as we are constrained to come to the conclusion that the judge was clearly right, in the consideration of all the merits of the case, that there was no cause of action, it will be unnecessary for us to consider the first question suggested, because if the judgment of no cause of action stands, the writ of attachment will *ipso facto* be dissolved.

The only question that is raised which needs our consideration is whether or not the findings are against the clear weight of the evidence submitted at the trial so as to require us, under section 12587 of the Compiled Laws of 1915 (section 15, chapter 18, judicature act), to disturb the findings of the learned circuit judge upon the questions of fact. A careful reading of this record has satisfied us that this is simply one of those unfortunate adventures entered into by parties in good faith, but which, because of adverse conditions and perhaps lack of experience, does not meet the expectations of those who engaged in the enterprise and results in failure instead of the anticipated success.

The finding of the trial judge with reference to the alleged misrepresentation of the indebtedness of the

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company is fully justified by the record. It was stated to plaintiff by at least three persons who had knowledge of the affairs of the company, that the indebtedness of the Huron Implement Company was $5,500, while it seems to be undisputed that this indebtedness amounted to only $5,200. The plaintiff entered into the agreement with a full knowledge of all the facts. He had at least as much knowledge of the sale and manufacture of farming implements as any other officer or stockholder of the Huron Implement Company. He was in complete charge of the affairs of the company, including the right to draw upon all the moneys in the treasury for any legitimate business of the company. He attended all the directors' meetings after he was elected director and all the stockholders' meetings that were called, and at no time did he raise any dissenting voice as to any action taken.

We are also of the opinion that the claim of plaintiff that there was fraud committed in the failure of the defendants to furnish sufficient funds to finance the business and organize the foundry is not supported by the evidence, and agree with the finding of the judge that it was not made to appear that there was any "express, unconditional promise or representation by the corporation through any one authorized to make such a promise, that more funds would be furnished than the cash capital on hand."

We are also of the opinion that the evidence fully sustains the fourth finding of fact, and that the failure to bring the Clinton plow factory to Bad Axe on the part of the directorate gives plaintiff no ground for the relief sought for. With reference to this, it appears that he did not complain until the finances of the concern were nearly exhausted, and then no attempt was made to call a meeting of the board of directors or the stockholders to take action with reference thereto.

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The proofs are convincing that it was the intention of all the parties to have the business managed as profitably as possible, and, if there were any errors in judgment, that they were concurred in by the plaintiff, and no complaints were made by him until after the moneys were nearly exhausted. It is apparent that the original stockholders of the Huron Implement Company were desirous of extending the established business of that company, and it is probable that the plaintiff had it in mind also to make the Clinton plow business the paramount activity. In this they may have been acting at cross purposes, but, however that may be, the direction and management of the business was in the plaintiff's hands, he having been induced to enter into the enterprise for the very purpose of assuming the managerial duties of the company, and in the performance of these duties it does not appear that he was interfered with.

Being of the opinion, as we have stated above, that the proofs fully sustain the findings of the judge, the judgment of the court below must be affirmed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

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GALLANT *v.* MILES.

1. APPEAL AND ERROR—TRIAL—EVIDENCE—ADMISSIBILITY—SAVING QUESTION FOR REVIEW.

   The rejection in the court below of testimony of plaintiff's misconduct, offered in support of defendants' theory that plaintiff voluntarily surrendered possession of the premises, in an action for damages for unlawful eviction, cannot be objected to for the first time in this court on the ground that such testimony was admissible in mitigation of damages.

2. TRIAL—ARGUMENT OF COUNSEL—CURING ERROR.

   Improper argument of counsel as to amount of damages to be obtained in order to avoid payment of costs, was not reversible error where the court promptly instructed the jury not to consider the costs or who was going to pay them, and later covered the same question in his general charge.

3. FORCIBLE ENTRY AND DETAINER—LANDLORD AND TENANT—STATUTES—TERMINATION OF TENANCY.

   A landlord who obtained entry by means of fraud, and was followed by officers, who, by false representations as to the writ of restitution, and with a display of force calculated to intimidate and terrify, but without actual violence, took plaintiff's goods from the premises, was liable for damages for forcible entry under section 13229, 3 Comp. Laws 1915, although the tenancy had been terminated by proper notice.

4. APPEAL AND ERROR—DIRECTED VERDICT.

   Where the court below would have been justified in directing a verdict for plaintiff, there was no error of which defendant could complain in submitting the question to the jury.

Error to Lenawee; Gilday, J., presiding. Submitted January 18, 1918. (Docket No. 128.) Decided March 27, 1918.

Case by Leon Gallant against Otis M. Miles and another for an unlawful eviction from leased property.

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Judgment for plaintiff. Defendants bring error. Affirmed.

Tripp & Burleigh and *J. N. Sampson*, for appellants.

B. D. Chandler, for appellee.

KUHN, J. The plaintiff leased from the defendants certain rooms in an apartment building in the city of Hudson, owned by them. There is some dispute between the parties as to what the exact agreement was at the time the apartment was leased. The arrangements were verbal and made by Mrs. Mary A. Miles and Mrs. Helen Gallant, the wife of plaintiff. The plaintiff claims that at the time the agreement was made, they were to give her, in addition to the rooms that were rented, certain lots or garden spots for the raising of garden vegetables. This is denied by the defendants, and it is claimed that this arrangement with reference to the garden was not made until later, that no additional compensation was paid for the use of the garden, and that on the part of Mrs. Miles it was a gift, without consideration, and had no relation to the leasing of the apartment. The rent was to be $1.75 a week. It is admitted by both parties that the tenancy was terminated on July 22d by a notice, served upon the plaintiff, to quit and surrender up possession of the premises "for nonpayment of rent and improper conduct, within seven days from the date hereof," as stated in said notice. Some time later, July 25th, it is claimed by the defendants, plaintiff paid to one of the defendants the usual weekly rent for the week ending July 22d. About the same time the defendants caused to be served upon the plaintiff an ordinary summons in assumpsit, issued out of the justice's court, the date of return being left blank. On the return day, as shown by the original summons, defendant Mary A. Miles appeared in the justice's court and

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proceedings were had which resulted in the issuing of a writ of restitution by the justice of the peace, which was, some time later, placed in the hands of A. W. Cooper, a deputy sheriff. On the 31st day of July following, the defendants employed Mr. Cooper to move the plaintiff out of the premises in question. He in turn employed Mr. John Roney, the city marshal, and also a Mr. McQueen and a Mr. Edwards, and these, together with the defendants, went to the premises in question while the plaintiff was away at his work. Mrs. Miles was the first to go into the house, and she went in and told Mrs. Gallant that she had come over to see what was the matter with the water pipes, and soon thereafter the two officers and Mr. Miles came in, and Mr. Cooper told Mrs. Gallant they had come to set her out, and also told her that he was a deputy sheriff and that he had a writ of restitution, and they then proceeded to pack up the plaintiff's goods and put them on a dray. Plaintiff's wife requested the officers to wait until the plaintiff came back, until she could telephone him, but the deputy sheriff informed her that he would not do that, and while they were packing the goods, she telephoned her husband, who immediately came home, and when he arrived there, found everything belonging to them out on the dray, and the deputy sheriff informed him that he had a writ of restitution and told him the effect of the writ and that he and the others were there for the purpose of putting him out. The officer asked where he should take the goods, and after some verbal altercation, it was determined to take the goods to the home of plaintiff's father. The plaintiff unlocked the coal house doors so that the officer and his assistants could get the coal and place it on the dray, and it is claimed by the wife of the plaintiff that she attempted to go back into the house after the goods were moved out and that the deputy sheriff took her by the arm and put her out.

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The plaintiff brought this action to recover damages, and, upon the trial, was limited in his recovery to damages for humiliation, shame and disgrace and the inconvenience he was put to by being dispossessed of the premises. The trial resulted in a verdict for the plaintiff of $164.50 damages.

It was conceded by counsel for defendants upon the trial that the proceedings had in the justice's court, in pursuance of the summons issued, were irregular, and that the writ of restitution issued was void, and they claim no rights under that proceeding. It seems further to be admitted by both parties that the tenancy had been terminated, and the question seems to be whether the defendants were endeavoring to take peaceful possession of the premises, or was their conduct a violation of the statute prohibiting forcible entries and detainers, being section 13229, 3 Comp. Laws 1915, which reads as follows:

"No person shall make any entry into lands, tenements or other possessions, but in cases where entry is given by law; and, in such cases, he shall not enter with force, but only in a peaceable manner."

Eleven assignments of error are relied upon for the reversal of the judgment. The seventh assignment of error relates to the contention of defendants' counsel that the court erred in refusing to admit evidence of plaintiff's improper conduct both before and after the termination of his tenancy. When this testimony was offered, it was stated by counsel that the purpose of offering it was to determine the question as to the correctness of plaintiff's or defendants' theory, viz., as to whether the premises were surrendered voluntarily by the plaintiff, as claimed by the defendants, or were obtained by force, as claimed by the plaintiff. It is now urged in the brief for the defendants that this testimony should have been received in mitigation of damages, for if this testimony had been admitted, the

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jury would have been able to see that the plaintiffs were not the kind and character of people to suffer humiliation and shame on account of being moved out of a house in the presence of immediate neighbors. We do not think that counsel is in a position to argue this question. The objection that these questions went to the measure of damages was not specifically called to the attention of the trial court, and we have held that before the question can be raised on appeal, the ground of objection must be specifically stated. See *Philip* v. *Heraty*, 135 Mich. 446, 456, in which decision many cases are cited.

2. It is also urged that the court erred in not declaring a mistrial on account of the argument of counsel for plaintiff, stating to the jury "that they must have more than $100 damages, for in case they did not get that much, costs would be charged against him and that he would obtain nothing." When this argument was made and objection taken, the court immediately stated that the jury should not consider the argument and were not to take into consideration the costs or who was going to pay them. Again in his general charge he covered the same question and advised the jury that they had nothing whatever to do with the question of costs. We have often held that under these circumstances improper argument does not constitute ground for reversal. See *Reese* v. *Railway*, 159 Mich. 605; *Merrill* v. *Tinkler*, 160 Mich. 580; *Wheeler* v. *Jenison*, 120 Mich. 428; *Pruner* v. *Railway*, 173 Mich. 152; *Devich* v. *Dick*, 177 Mich. 177; *Eberts* v. *Sugar Co.*, 182 Mich. 473; also *Goldman* v. *Railway*, *post*, 543.

3. The remaining assignments of error relate to the charge of the court. It is stated in the brief for the defendants that the question involved in this case is, "the right of a landlord to enter upon his premises and put out of possession one who holds them unlaw-

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fully and without right;" it being conceded that the tenancy had been terminated by proper notice. It is the contention of the plaintiff that the entry and possession obtained by the defendant Mary A. Miles was obtained by stratagem and fraud and was not a peaceful entry within the meaning of the law. It is his claim that after such entry was obtained by stratagem, the officers followed and by false representation as to the writ of restitution made to both his wife and himself, took the goods from the premises and notified him that unless he provided a place for his goods, they would be dumped into the street; that under such circumstances, plaintiff's direction to take the goods to the home of his father can not be said to have been a voluntary surrender of the premises. We think that the law with reference to this situation is fairly settled by the decision of this court in *McIntyre* v. *Murphy*, 153 Mich. 342, a case similar in many respects to the one now before us. No actual violence was used in that case, and there, as here, there was merely the display of force. A verdict for the plaintiff was directed, and was sustained by this court. Justice CARPENTER, in writing the opinion, reviews the statute here in question and the authorities, and it seems unnecessary to again go over the legal questions involved. The court concluded that while it did not appear that actual violence was used towards the inmates of the house, there was a display of force calculated to intimidate and terrify them, and that, under the authorities discussed in the opinion, the entry was forcible and contrary to the statute. The court there sustained the direction of a verdict for the plaintiff, but we are of the opinion that it clearly was not error to submit the questions in the instant case to the jury, and are of the opinion that the court might properly, under the facts and circumstances of this case, and under the authority of the *McIntyre Case, supra*, have directed a

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verdict for the plaintiff as to the liability of the defendants. That being true, there could be no error in submitting the question to the jury, and the jury was warranted in awarding damages for injuries done to the plaintiff in the course of the eviction.

We have been unable to find any prejudicial error in this record, and therefore affirm the judgment.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, and STONE, JJ., concurred. FELLOWS, J., did not sit.

FULTON *v.* MOHR.

1. AUTOMOBILES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

   In an action for the death of plaintiff's decedent, caused by his being struck by defendant's truck, where the evidence showed that decedent, in the middle of a block of a narrow street, suddenly stepped from behind another car where he could not be seen, and proceeded diagonally across the street with his back toward the direction from which vehicles would come, with his coat collar turned up and his head down, without looking, and apparently so engrossed in thought that he failed to hear either the noise of the truck or the shout of warning, and was hit by the truck, he was guilty of contributory negligence as a matter of law, barring recovery.

2. SAME—CONTRIBUTORY NEGLIGENCE — UNLICENSED CHAUFFEUR — NEGLIGENCE.

   Where decedent was guilty of contributory negligence as a matter of law, barring recovery, the fact that defendant's chauffeur was unlicensed becomes immaterial.

3. APPEAL AND ERROR—DIRECTED VERDICT—REVIEW.

   Where the court below properly directed a verdict for defendant, the judgment will be affirmed by the appellate court although for a different reason.

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Error to Wayne; Hally, J. Submitted January 11, 1918. (Docket No. 55.) Decided March 27, 1918.

Case by Jean Fulton, administratrix of the estate of James Fulton, deceased, against Frank Mohr for the negligent killing of plaintiff's decedent. Judgment for defendant. Plaintiff brings error. Affirmed.

Dohany & Dohany, for appellant.

J. O. Murfin (*Howard H. Campbell*, of counsel), for appellee.

KUHN, J. On the afternoon of March 5, 1915, plaintiff's decedent, while attempting to cross Scotten avenue a short distance north of Michigan avenue in the city of Detroit, was struck by a one-ton motor truck belonging to defendant, then being driven by defendant's employee in connection with the plumbing business conducted by defendant in said city, and received injuries from which he died about an hour later. It had been a stormy day, and at the time of the accident a heavy, wet snow was falling. The truck was proceeding, at a speed of about eight miles an hour, along Scotten avenue in a southerly direction, and was keeping just a little to the right of the center of the street, which is 30 feet wide and was at that time free from other vehicles, except a Ford automobile parked, facing south, close to the westerly curb in front of the Standard Oil Company's offices, which face Scotten avenue at the point where the accident occurred. This Ford car measured 11 feet 3 inches in length and 4 feet 8 inches in width; its top was up and the side curtains on. No one saw deceased prior to or at the time he stepped off the west curb of the street, but an employee of the Standard Oil Company testified that she saw him a step or two from the curb, in front of this Ford automobile and within two or

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three feet of it, walking at a moderate speed in a southeasterly direction diagonally across the street, at an angle of about 45 degrees. His head was down and his coat collar up. Just as he cleared the Ford car he was seen by the driver of the truck, which was then about three feet behind the rear of the Ford. The driver at once applied the brakes, turned his car to the left to avoid striking the man, and, just as the car hit the man, was reaching down to apply the emergency brake. He did not sound the horn—claims he did not have time—but another of defendant's employees on the truck yelled at the man, without, however, attracting his attention, and deceased was struck by the left front of the truck and received the fatal injuries. It cannot be exactly stated from the testimony how far the truck went after the collision, but the distance as given by the witnesses varies from 4 to 18 feet. There was some testimony to indicate that deceased had reached a point east of the center of the street at the time he was struck. When the truck was stopped, he was found between the axle and the left spring.

According to the testimony of the driver, the truck was not loaded, the brakes were in good condition, and under the conditions that existed that day, he could stop the car within its own length, 12 feet. The regular driver of the truck had been sick for some weeks prior to the accident, and a junior plumber in defendant's employ (not a licensed chauffeur) was acting as driver at the time of the accident. It appears that he had been driving this truck during the entire period the regular driver was away; also that he had driven it during the sickness or absence of the regular driver on prior occasions, and that he had driven other makes of automobiles at various times, his experience as a chauffeur extending over about four years prior to the accident.

At the conclusion of plaintiff's testimony, the court,

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upon motion, directed a verdict for defendant on the ground that there was no evidence that would warrant the jury in finding him guilty of negligence.

The following statement is found in the brief of counsel for appellant:

"It is plaintiff's contention that the fact that defendant's automobile was being operated by an unlicensed chauffeur at the time of plaintiff's injury has a bearing on the question of defendant's negligence in this cause."

The record does not show that this point was presented to the lower court by any request to charge or that the attention of the lower court was in any way directed to this question. The lower court based its decision for a directed verdict on the ground that there was no evidence that would warrant the jury in finding the defendant guilty of negligence, and we are of the opinion that the judge might properly have also based his conclusion upon the ground that it conclusively appears, and therefore should be decided as a matter of law, that the plaintiff's decedent was guilty of such contributory negligence as would bar the right to a recovery. It therefore does not become necessary to consider the question as to whether or not the fact that the driver of the automobile was an unlicensed chauffeur might be properly considered as bearing upon the question of defendant's negligence. We think it is sufficient to say that this record affirmatively shows that the decedent, in the middle of a block of a narrow street, 30 feet in width, suddenly and unexpectedly stepped from behind another car where he could not be seen by the driver of defendant's car, with his back turned towards the portion of the highway that would necessarily be traveled by an automobile on that side of the street, with his coat collar turned up and his head down; further that he not only failed to look, but apparently was so engrossed with

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other thoughts that he failed to hear either the noise of the car or the shout of warning from the companion of the driver. We think the language used by Mr. Justice STEERE in *Barger* v. *Bissell*, 188 Mich. 366, is applicable here:

"The evidence is undisputed that plaintiff stepped quickly off the curb on the side of the street the car was running, and started rapidly to cross just in front of and diagonally from this closely approaching car, with her head down, without looking, her back turned partially from it and from the direction vehicles should be expected upon that side of the street. It is manifest that she exercised no care at all, and, if an adult, she would clearly be barred from recovery by her own carelessness and negligence."

See, also, the recent case of *Hill* v. *Lappley*, 199 Mich. 369.

While the learned circuit judge did not base his conclusion for a directed verdict upon the reasons herein stated, nevertheless, as we are of the opinion that he acted properly in directing the verdict, his action and the resulting judgment will be affirmed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

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GOLDMAN v. DETROIT UNITED RAILWAY.

1. CARRIERS—STREET RAILWAYS—PERSONAL INJURIES—FRIGHT—NERVOUS SHOCK—DAMAGES.

   In an action for personal injuries by a passenger against a street car company, evidence that there was, as a result of a collision, a violent impact and crash, and by reason thereof plaintiff was thrown to the floor of the car, justified the finding of the jury that plaintiff suffered a physical shock, resulting in extreme nervousness and hysteria, which was due to the collision and not merely to fright.

2. NEW TRIAL—MISTRIAL—DISCRETION OF COURT.

   In an action for personal injuries against a street car company, in which plaintiff claimed to be suffering from nervous shock, where, immediately after leaving the stand, and while another witness was being examined who stated she was a trained nurse, loud screams were heard in the corridor, and the witness was called from the stand by plaintiff's counsel, who stated "That is what I feared," and the court below refused to declare a mistrial, but submitted the case to the jury after properly instructing them to disregard the incident, the action was within the discretion of the trial court, and where it cannot be determined by the appellate court that there was an abuse of discretion resulting in a miscarriage of justice, the judgment of the court below will not be interfered with.

3. TRIAL—ARGUMENT OF COUNSEL—CURING ERROR.

   Improper argument of counsel in asking the jury if there was a gentleman on it "who would take that for all the money that could be given," was not so prejudicial as to require reversal of the judgment, where the court promptly instructed the jury to pay no attention to the argument, and correctly charged them as to the proper measure of damages.

Error to Wayne; Brown, J., presiding. Submitted January 10, 1918. (Docket No. 43.) Decided March 27, 1918.

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Case by Dora Goldman against the Detroit United Railway for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

A. B. Hall, for appellant.

Maloney & Mendelsohn, for appellee.

KUHN, J. The plaintiff was a passenger on a Brush street car in the city of Detroit, operated by the defendant, on the 17th day of February, 1915. While proceeding north, the car was struck, at the intersection of St. Antoine street and Forest avenue, by a crosstown car going east and a portion of the car was knocked from the track. The plaintiff, who was sitting in about the center of the car, saw that a collision was imminent, put up her hand to avoid screaming, and then says she does not remember anything after that until she found herself on the rear end of the car. There is no dispute as to the collision nor as to the fact that the plaintiff was free from contributory negligence. It is the claim of plaintiff that after the accident she assisted a Mrs. Schooler, who was also injured in the accident, and was driven by a doctor to her own home; that upon arrival there she fell into a faint, and was put to bed; a doctor was called, who found no marked symptoms; that subsequently, however, she developed highly nervous symptoms, which resulted in seriously and permanently injuring her health, and which condition she claims continued and remained up to the time of the trial.

A number of physicians who treated her were called to the witness stand to testify as to her condition, who fully described to the jury her physical condition and the injuries which it was claimed resulted from the accident. Dr. Spitzley, one of these physicians, in answer to a hypothetical question, in detailing what,

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in his opinion, had caused her condition as he found it, said:

"Certainly I ascribe it to the hurt or injury that she sustained; I thought so then and I think so now."

The case was tried twice in the circuit court. The first trial, which resulted in a verdict in favor of plaintiff in the sum of $5,641.66, was set aside on account of the misconduct of the jury. The second trial resulted in a verdict of $4,000 in favor of the plaintiff.

The first contention of appellant's counsel, as presented in his argument and brief, is that the testimony in the case is conclusive that the plaintiff was not physically injured at the time of the accident, and that her present condition is due to hysteria, and that the hysteria is the result of fright and not of the accident. The case of *Nelson* v. *Crawford,* 122 Mich. 466, is relied upon to support the contention that under these circumstances no recovery can be had. We may concede, so far as this case is concerned, the rule announced in *Nelson* v. *Crawford, supra.* It clearly appears that in that case there was no assault or attempt to do the plaintiff any physical or bodily injury, and the court charged the jury, which was approved by this court, that the law does not recognize fright alone, unaccompanied by any physical injury, as a basis for damages. In the present case the question was submitted to the jury by the trial judge with the following instructions:

"No matter what may have caused the injury to plaintiff, if you find she was injured in this accident, she cannot recover unless you find from the evidence that she was injured in the manner as claimed by her here; that is, that she suffered physical shock which resulted in injury to her nervous system, and thereby she has become injured, and that this shock was a result of the accident.

"If you find from the evidence that the plaintiff suffered physical shock which resulted in injury to her

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nervous system, she is entitled to recover such injury as she has shown you she has sustained, though there be no external evidence of injury.

"If she was not injured in the manner as claimed by her here, then she cannot recover and your verdict will be for the defendant."

It cannot be, and it is not, denied that there was, as a result of the collision, a violent impact and crash and a jar. There is testimony of eyewitnesses that the plaintiff, as a result thereof, was thrown to the floor of the car, and we are of the opinion that there was clearly sufficient evidence for the jury to conclude that the plaintiff's injuries, even though not immediately visible upon the surface of the body, and which developed at a future date, were due to the violent collision which occurred, thus clearly distinguishing the situation in the present case from that of *Nelson* v. *Crawford,* where there was no claim of any physical injury. See *Light* v. *Railway Co.,* 165 Mich. 433; *Humphrey* v. *Railways Co.,* 166 Mich. 645; *Schroeder* v. *Railway Co.,* 174 Mich. 684. An interesting and leading case on this subject is the case of *Purcell* v. *Railway Co.,* 48 Minn. 134.

The next contention of appellant's counsel is that the court erred in refusing to declare a mistrial because of the following occurrence: It appears from the record that immediately after counsel for appellant had closed his cross-examination of the plaintiff, she was released and left the court room. Another witness was called and sworn for the plaintiff, and shortly after her examination was begun, loud screaming and shrieking were heard as coming from the corridor. The witness upon the stand at the time, who was a trained nurse, left the court room at the request of plaintiff's counsel, and plaintiff's counsel thereupon stated, "That is what I feared." The record shows that the following then took place:

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"*Mr. Hall:* I move, the court please, that this case be called a mistrial, on the ground that the plaintiff left the court room after examination, went into the hall and proceeded to scream and holler so that the attention of the court and jury was attracted to it. A witness was on the stand and had just testified she was a trained nurse—left the stand and went to the plaintiff, apparently. I submit that under these circumstances that the yells were so loud and piercing as to be heard throughout the building; everybody's attention in the court room was attracted to it, including the jury, and I think that justice cannot be done under the circumstances to have this trial proceed.

"*Mr. Moloney:* We object to it, your honor, please.

"*The Court:* The jury will understand that this case is being tried on the evidence that is offered here by the witnesses in court. That what takes place outside of the court room you haven't any basis for using it inside. You do not know, only as you might surmise what is going on, and you know less about what it is going on. There is absolutely no presumption in the case either that it is meritorious or fictitious, and you haven't any way of telling anything about it. This case is going to be tried on the testimony taken in court here, and we will proceed at this time. You are here with the witnesses taking up the time of the court, and you have the jury and we will go ahead at this time, and you (addressing jury) will understand that any transactions taking place outside of the court room is something that you are to give no consideration. If you should attempt to give it any consideration, you will undoubtedly be wrong. You would be wrong in attempting it, and when it is outside of your observation, you do not know who it is. Now, if you have a presumption who it is, that is something that you cannot use. If you should attempt to presume what is taking place outside in the corridor and why it is taking place, you would undoubtedly be wrong in your conclusion as well as very wrong in your attempt to do it. Let me get that in your mind correctly, that you will not try to take into consideration anything except what took place in the court room, and noticing then only what comes from the witness chair. We will proceed with the case at this time."

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With reference to this incident, the language of Mr. Justice BROOKE, in *Jolman* v. *Alberts*, 192 Mich. 368, we think is appropriate:

"With reference to incidents such as that under consideration, which, though infrequent, sometimes do occur in the course of a trial, it may be said that the presiding judge should, in the exercise of sound discretion, primarily determine whether they are prejudicial to that point which would require him to discharge the jury and announce a mistrial. In such disposition as the trial court may make, this court should not interfere, unless it plainly appears from an examination of the record with special reference to the verdict that there has been a miscarriage of justice."

We are unable to determine or say from this record that there has been a miscarriage of justice. If the plaintiff's witnesses with reference to her injuries were believed by the jury, we are not of the opinion that the plaintiff recovered too much, and therefore do not believe that the disposition made by the trial judge of this incident should be interfered with. See, also, *People* v. *Kimbrough*, 193 Mich. 337.

The remaining assignments of error relate to remarks of counsel in argument to the jury. Complaint is made of the following statement:

"Is there a gentleman on this jury who would take that for all the money that could be given?"

and the case of *Hughes* v. *City of Detroit*, 161 Mich. 283, is relied upon to show that this was prejudicial error. When the statement criticized was made to the jury in the present case, however, the court immediately proceeded to call their attention to the fact that the statement was improper, asked the jury to pay no attention to the argument, and correctly charged them as to the proper measure of damages. Under these circumstances we have held that improper argument does not constitute ground for reversal. See

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Reese v. *Railway*, 159 Mich. 605; *Merrill* v. *Tinkler*, 160 Mich. 580; *Wheeler* v. *Jenison*, 120 Mich. 428; *Pruner* v. *Railway*, 173 Mich. 152; *Devich* v. *Dick*, 177 Mich. 177; *Eberts* v. *Sugar Co.*, 182 Mich. 473.

With reference to the other argument which is criticized, we think it is sufficient to say that we do not consider the statements complained of sufficiently prejudicial to reverse the case.

The case was fairly submitted to the jury and we find no reason for reversing the judgment of the court below. It is therefore affirmed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, FELLOWS, and STONE, JJ., concurred. BROOKE, J., did not sit.

MARTIN v. BENZIE CIRCUIT JUDGE.

1. HABEAS CORPUS—RES JUDICATA—MINORS—RIGHT TO CUSTODY—PARENT AND CHILD.

   A final adjudication on writ of habeas corpus, brought to determine the right of a parent or guardian to the care and custody of a child, conclusively determines all questions necessarily involved as between the same parties and upon the same state of facts, but is no bar to a later proceeding under changed conditions.

2. SAME — MANDAMUS — RES JUDICATA — CHANGED CONDITIONS — HEARING UPON MERITS.

   Mandamus will issue to compel the court below to grant a hearing upon the merits of a petition for a writ of habeas corpus by a father for the custody of his child, although a previous adjudication was against him, where the petition alleged that conditions had materially changed since the former proceeding.

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Mandamus by Harley Martin and another to compel Charles B. Collingwood, acting circuit judge of Benzie county, to grant a hearing upon a writ of habeas corpus. Submitted February 12, 1918. (Calendar No. 27850.) Writ granted March 27, 1918.

Parm C. Gilbert (*Thomas Smurthwaite*, of counsel), for plaintiffs.

Marion G. Paul (*W. E. Daines*, of counsel), for defendant.

KUHN, J. This proceeding involves the right of a father to prosecute a writ of habeas corpus to obtain the custody of his own daughter.

Leola Martin, the child here in question, was born on or about November 4, 1913, and is the daughter of Harley Martin, one of the plaintiffs herein, and of Vera Martin, who died at the birth of the child. After the mother's death, an arrangement was made by the father with Cassius and Isabella Chandler (Cassius Chandler being the brother of the mother of the child) to take the child to their home. There was no special contract made, written or otherwise, and no adoption. The father lived for a short time with the Chandlers on their farm, but trouble arose between them and he left. He afterwards began proceedings in the circuit court for Benzie county to obtain possession of his child. Shortly before the hearing with reference thereto, Harley Martin married his present wife, the plaintiff Nellie Martin, and after a hearing before the Hon. Fred S. Lamb, circuit judge, the court decided that the best interests of the child would be conserved by leaving her with the Chandlers, her uncle and aunt.

About a year after this first hearing, Harley Martin again presented a petition and obtained a writ of habeas corpus from Judge Lamb, to which proceeding objections were presented by the respondents Cassius

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and Isabella Chandler, who made a motion to quash the proceedings, claiming in substance that the prior proceeding in 1915 was a bar to the present hearing and that the latter writ issued must be quashed and the present petition dismissed. This motion came on for hearing before the present respondent, Hon. Charles B. Collingwood. On this hearing, the respondent granted the motion and filed a written order to that effect, which appears in the record. Mandamus is asked for in this proceeding to compel the circuit judge of Benzie county to proceed with the hearing upon the writ of habeas corpus and that the order made by respondent be vacated and that the plaintiff be granted a hearing.

The merits of the whole controversy are not involved here, and counsel seem to agree that the only question for determination is whether or not the plaintiffs have made a sufficient showing in their petition to entitle them to take proofs and to be heard.

The courts have made a distinction in habeas corpus cases between those brought to determine the custody of children and those brought to determine the legality of sentences of parties to imprisonment. This distinction is referred to in the case of *In re Mould*, 162 Mich. 7, and the general rule seems to be fairly deducible from the authorities that a proper final adjudication on writ of habeas corpus, brought to determine the right of a parent or guardian to the care and custody of a child, conclusively determines all questions necessarily involved as between the same parties and upon the same state of facts. For a review of the authorities, see note in *Re King*, 67 L. R. A. 783 (66 Kan. 695). This petition is filed, however, upon the theory that a new condition has arisen materially different from that existing when the former adjudication was had. The petition alleges:

"That upon the decision of said court in November,

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1915, and thereafter said Chandlers failed to observe and obey said order and have not granted to the said Harley Martin the right to freely visit his child at their home nor welcome him there, but have purposely and unlawfully interfered therewith, as shown by the allegations of the present petition of these plaintiffs, Exhibit D, hereto annexed.

"That it has lately come to the knowledge of plaintiffs that the said Cassius Chandler is not a man of integrity and honesty, and that the practice of said Chandler in defaming the said plaintiffs, and particularly the said Harley Martin, has but recently come to the knowledge of these plaintiffs, and that likewise the later treatment of the said Harley Martin by the said Chandlers and their refusal to allow him to see his child except within their own house and dooryard, and their forbidding him to take said child outside the yard and into the roadway and to his own home or any place for a visit, which plaintiffs allege they have continually done (all of which is referred to in the present petition of said plaintiffs), constitutes such new facts and charges as to entitle these plaintiffs to a present hearing upon said petition."

The courts should, and have always had in mind, in the determination of the vexing questions arising concerning the custody of a child, the best interests of the child and also the natural and humane feelings and sentiments of the parents. We are not, in this case, however, called upon to review the determination of the learned circuit judge who first decided the case upon its merits, and who had in making that determination the advantage of seeing the parties in court and hearing the testimony from the witness stand. The sole question here is, Should there be another hearing upon the merits as to the claimed changed conditions alleged in the new petition filed and on which the new writ of habeas corpus was allowed? In our opinion, the charge as to a change in the conditions was sufficient to warrant an investigation. If found true, the charge that the Chandlers were

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seriously prejudicing the child against its father is one that is vital and of serious importance. The superior right of the parent to the child should only be enforced when it accords with the best interests of the child. As was said by Chief Justice STEERE in the case of *In re Gould*, 174 Mich. 673:

"The leading principle being that, when the right of the parent is not clear and imperative, the best interests and happiness of the child must always control the decision of the court."

Whether or not the alleged conduct of those now in charge towards the father seriously affects the best interests of the child, cannot be determined until the proofs have been taken and the case heard on its merits. The learned circuit judge, the respondent herein, in his return, states that he is constrained to hold that no substantial change in the facts and circumstances surrounding the child or affecting its welfare has taken place since the former trial. This conclusion, however, in view of the charge made, it seems to us can only be determined after the introduction of the testimony. It may be that after the proofs have been taken, the court may still be of the opinion that the conclusion reached in his return is a proper one; but upon the petition as presented, we are constrained to hold that the plaintiffs were entitled to a hearing and an opportunity to present their proofs. The writ will, therefore, issue as prayed for, and the circuit court is instructed to proceed to a hearing on the writ of habeas corpus issued.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

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PEOPLE, *for the use of* WESTOVER-KAMM CO., *v.* VALLEY MANTEL & TILE CO.

1. CONTRACTS — MUNICIPAL CORPORATIONS — PUBLIC BUILDINGS — STATUTORY BONDS—SUBCONTRACTORS.

   One who takes a contract under the original contract, and is to perform in accordance with the original contract, is a subcontractor, and, in order to recover under the statutory bond, he must comply with the statute in giving the proper notice. Section 2, Act No. 187, Pub. Acts 1905 (3 Comp. Laws 1915, § 14828).

2. SAME—SUBCONTRACTORS—ORIGINAL CONTRACT THE STANDARD.

   That one furnished materials for the erection of a public building in conformity with the original contract would not make him a subcontractor if he was ignorant of the terms of the original contract and did not agree that it should be the standard; one cannot become a subcontractor unless he contracts to become such.

3. SCHOOLS AND SCHOOL DISTRICTS—STATUTORY BONDS—MATERIALMEN—SUBCONTRACTORS—NOTICE.

   In an action against the sureties on the statutory bond of the contractor on a school house, evidence on the question as to whether plaintiffs were materialmen or subcontractors examined, and *held*, to support the finding of the court below that plaintiffs were materialmen, rendering immaterial the question of the sufficiency of the notice required to be given by subcontractors under section 2, Act No. 187, Pub. Acts 1905 (3 Comp. Laws 1915, § 14828).

4. SAME—BANKRUPTCY—STATUTORY BONDS.

   Bankruptcy of the contractor on a school building is no bar to an action by the materialmen against the sureties on the statutory bond on the ground that the amount of the liability cannot be fixed pending settlement of the bankrupt's estate, where there is no question as to the amount due plaintiffs, since by paying the judgment the defendants are legally entitled to be subrogated to plaintiffs' claims against the estate.

Error to Bay; Mayne, J., presiding. Submitted January 30, 1918. (Docket No. 79.) Decided March 27, 1918.

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Assumpsit by the people of the State of Michigan, for the use and benefit of the Westover-Kamm Company and others, against the Valley Mantel & Tile Company and others upon a statutory bond. Judgment for plaintiffs. Defendants bring error. Affirmed.

James Donnelly and *C. W. Hitchcock,* for appellants.

Stoddard & McMillan, for appellees.

KUHN, J. The Valley Mantel & Tile Company, on the 13th of July, A. D. 1915, executed a contract with school district No. 2 of the township of Portsmouth, in Bay county, this State, for the erection of a school building in that district. The building was erected in accordance with certain plans and specifications furnished by an architect, and was completed under the supervision of the architect and a certificate of the completion thereof was given. The plaintiffs furnished certain materials used in the construction of the building. No notice of any kind was given by any of the plaintiffs to the contractor, the Valley Mantel & Tile Company, or to the school district, until after the completion of the construction of said building and its acceptance by the building committee and the architect. After the contract had been performed, the plaintiffs in this cause started suit for the collection of the several amounts claimed to be due them. This suit is brought under Act No. 187, Public Acts of 1905 (3 Comp. Laws 1915, § 14827 *et seq.*), upon a bond given pursuant to that statute by the contractor, as principal, and the defendants DeWaele, Marande and Hayward, as sureties. Upon the trial, after considerable evidence had been introduced with reference to the claims of the various parties, counsel for the parties, plaintiffs and defendants, agreed as to the amounts owing for materials, etc., furnished by the several claimants, and after giving credit for 10 per cent. paid

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by the estate of the defendant, Valley Mantel & Tile Company, bankrupt, and charging 5 per cent. interest on the several claims, the amounts due the several claimants were also agreed upon by counsel as follows:

Westover-Kamm Co.	$769.39
Ideal Plumbing Co.	75.95
Kaustine Co.	177.81
Jennison Hardware Co.	397.12
Henry G. Koch	57.96
Matthew Lamont's Sons Co.	41.62

and judgment was entered accordingly.

It was insisted on behalf of plaintiffs that all of the claimants were materialmen and not subcontractors, and it was agreed by the court and counsel that there were no questions of fact involved, the counsel for the defendants stating that,—

"The question of the service of notice I agree is a question of law, and the question of whether the claim of the plaintiffs in the case are materialmen or subcontractors, I think, also is a question of law."

The case was decided by the court as upon a directed verdict, the court finding against the contentions of counsel for defendants upon the question of whether or not the claimants were subcontractors or materialmen. It was conceded by counsel for defendants that Matthew Lamont's Sons Company was a "materialman." We will have no difficulty in affirming this judgment, if the conclusion of the circuit judge was correct that the other claimants were materialmen rather than subcontractors.

The question here involved had the careful consideration of this court in the opinion written by Mr. Justice CARPENTER in the case of *People, for use of Davis*, v. *Campfield*, 150 Mich. 675. The definition of a subcontractor by this court in the case of *Avery* v. *Board of Sup'rs of Ionia Co.*, 71 Mich. 538, was adopted, where it was said:

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"The subcontractor is an under contractor,—one who takes under the original contract, and *is to perform in accordance with the original contract.*"

It is there said that the test is, Has the person furnishing the material agreed that the original contract shall be the standard by which the performance of his contract shall be judged? If he has, he is a subcontractor and cannot recover on the statutory bond without the proper notice. It is also further said:

"Under this definition, and according to this test, a manufacturer who agrees to furnish the doors and sashes for a building in accordance with the terms of the original contract, is a subcontractor, while if he merely agrees to furnish them in accordance with certain measurements, he is a materialman."

It is also further stated that if he furnished the materials in ignorance of the terms of the original contract, while in fact they conform to the terms of that contract and result in a fulfilment of the original contract, the person furnishing the material would still be a materialman, "because he has not agreed that the original contract shall be the standard. * * * He cannot become a subcontractor unless he contracted to become such."

Applying these tests to the situation before us, we think it conclusively appears that none of these claimants contracted to become a subcontractor. The original contract provided, among other provisions:

"The contractor shall make no subcontract except with parties satisfactory to the architect."

The architect who prepared the plans and specifications and who supervised the construction of the building, and who certifies to the completion thereof, testified that there were no subcontractors. There is no testimony to warrant the claim that any of these claimants contracted to become a subcontractor, or that they agreed to take under the original contract

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and to perform in accordance with the original contract. It is true that some of them, at the time they made their bids in a lump sum for the various materials which constituted their claims, had before them specifications and plans, but we do not think that this was sufficient to make them subcontractors, because it does not appear that they did agree to take under the original contract and perform in accordance with its terms. We think that the situation is distinguishable from the case of *People, for use of Buhl Sons Co.*, v. *Finn*, 162 Mich. 481, where the proposition to furnish materials was to be in accordance with plans and specifications which were a part of the original contract, and the subcontract was made with especial reference to the original contract, plans and specifications. See, also, *Staffon* v. *Lyon*, 104 Mich. 249; *People, for use of Hirth*, v. *Powers*, 108 Mich. 339; *People, for use of Winkle Terra-Cotta Co.*, v. *Cotteral*, 119 Mich. 27; *People, for use of Kroenke*, v. *Trust Co.*, 154 Mich. 614; *People, for use of Kuenzel*, v. *Construction Co.*, 159 Mich. 133; *People, for use of Sauer*, v. *Connell*, 195 Mich. 77.

In view of this conclusion, it will be unnecessary to discuss or consider the question of the sufficiency of the notice which was given, which, it is contended by the plaintiffs, was sufficient to bring it within the provisions of the statute, even if it should be held that plaintiffs were subcontractors instead of materialmen.

There is also a contention made by counsel for appellants: "The court erred in receiving any testimony, because the exact liability, if any, could not be fixed," owing to the fact that the contractor had been adjudicated a bankrupt and that its estate in bankruptcy had not been settled. We do not think that there is any merit to this contention. There is no question as to the amounts due the several claimants,

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and credit has been given for the dividend of 10 per cent. already paid by the trustee in bankruptcy. The sureties, if they pay the judgment recovered against them, will be legally entitled to be subrogated to the rights of the several claimants as against the estate of the contractor and receive whatever further dividends may be paid.

The judgment should be, and is hereby affirmed.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

JENNINGS v. REESON.

1. WILLS—REFERENCE TO DEED—VALIDITY—INTENTION.
   Where testator by his will clearly expressed his intention that a farm should go to his daughter, referring to a deed of the farm to her which he had executed and placed in escrow, the validity of which is questioned but not determined, *held*, to be a valid devise.

2. DEEDS—DELIVERY—QUESTION OF LAW.
   Where it is undisputed that a deed of a farm from a wife to her husband was executed and delivered by her, and was in his possession at the time of her death, the court below properly held that there was a valid delivery, as a matter of law, although there was some question as to whether the deed was entitled to record by reason of the fact that it was acknowledged and witnessed over the telephone.

3. EJECTMENT—DEEDS—EVIDENCE—ADMISSIBILITY.
   In ejectment proceedings, where plaintiff claimed title under a deed from his wife, testimony as to another deed, executed at the same time, from the husband to the wife, of another parcel of land, was properly rejected as immaterial.

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Error to Genesee; Stevens, J. Submitted January 18, 1918. (Docket No. 135.) Decided March 27, 1918.

Ejectment by John H. Jennings against Edwin L. Reeson. Judgment for plaintiff on a directed verdict. Defendant brings error. Affirmed.

Sylvester Pheny and *James H. Lynch*, for appellant.

George W. Cook (*Clarence Tinker*, of counsel), for appellee.

KUHN, J. This is an action of ejectment. Plaintiff having obtained a judgment of restitution of the premises, the cause is removed to this court by the defendant by writ of error.

John Reeson and wife, Mary A. Reeson, resided in the village of Fenton, Genesee county, in this State. Mr. Reeson died on the 1st day of May, 1908, and Mrs. Reeson died prior thereto. Two surviving children were left, a son and a daughter, Edwin L. Reeson, the defendant herein, and Mary E. Jennings, now deceased. Mr. Reeson prior to his death owned two pieces of real estate, a farm and a house and lot in the village of Fenton. Prior to the death of Mr. and Mrs. Reeson, on the 4th day of February, A. D. 1895, they made, executed and acknowledged a deed of the farm to the daughter, Mary E. Reeson Jennings, and a deed of the village property to their son, the said defendant, Edwin L. Reeson. These deeds, thus executed, were enclosed in an envelope, upon which was written the following:

"Valuable title deeds to real estate in Fenton, to remain subject to control of John Reeson and Mary A. Reeson, his wife, during their natural lives. To the president or cashier of the State Bank of Fenton. On being informed of the demise of the two persons above named you may deliver the deed enclosed to our son and daughter as named in the separate deeds running to them with the old deeds of the same property, un-

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less before otherwise directed by us. Fenton, February 6, 1895.

"JOHN REESON,
"MARY A. REESON.

"Henry C. Riggs, Attorney and Notary Public, Fenton, Mich."

The envelope containing the deeds and other papers was deposited in the State Bank of Fenton, presumably at about the time the deed was made. After the death of Mrs. Reeson, John Reeson made his will, and after disposing of his personal property, the will contains the two following paragraphs:

"It is to be understood by this that all my property not already disposed of by deed is to go to my daughter Mary Jennings, aforesaid, in consideration for services rendered and from the fact that I have already given my son his full share.

"As my property now stands, I have deeded my farm to my daughter and my village property to my son, deeds being held in trust and not to be recorded until my death. These deeds, with the above mentioned personal property, dispose of my entire possessions exactly as I wish, and it is to be understood that this disposition is to be made by placing the deeds on record and turning over the personal property as above directed, without any necessity of probating the estate, as by so doing everything is disposed of as I wish it, and the expense of probating is thereby obviated."

This will was not presented for probate until some question had been raised as to the validity of the deeds, which had been placed on record after the death of the father. The will was admitted to probate on the 8th day of December, 1915. The daughter, Mary E. Reeson Jennings, who died prior to the probate of this will, had made and signed a deed of the farm to John H. Jennings, the plaintiff. It appears that Mrs. Jennings was sick and unable to leave her home. She gave the deed to plaintiff, who took it to Mr. Hitchcock, the cashier of one of the banks in the village of

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Fenton, who was a notary public, and who took her acknowledgment over the telephone, and her signature to the deed was at that time witnessed by himself and by Mr. George Green, the assistant cashier, neither of whom saw Mrs. Jennings personally on that occasion. The deed was left at the bank by John Jennings and was there when Mrs. Jennings died. He subsequently took the deed from the bank and had it placed on record. Mrs. Jennings assumed ownership of the farm in question after the deed to her was recorded, and continued so until her death. After the title to the farm was disputed, Mr. Jennings instituted proceedings before one of the circuit court commissioners of Genesee county to get possession of the farm, and in this action he was successful, but an appeal was taken to the circuit court, and before he actually took possession of the farm, defendant took possession thereof and was in possession at the time this suit was instituted.

It is the claim of plaintiff that he obtained title to the farm by virtue of the will conveying the farm in question to Mary E. Reeson Jennings and by the deed from her to himself.

The defendant contends that there are three principal issues in this case:

1. Whether or not Mary Jennings, by virtue of the deeds deposited in the bank in February, 1895, obtained title to the property in question.
2. Are the deeds of John Reeson to be construed as a part of his last will and thus convey title to Mary Jennings?
3. Was there any delivery of the deed of Mary Jennings to John Jennings?

It is insisted by counsel for defendant that these questions should all be answered in the negative.

No contention is made by counsel for the plaintiff and appellee that the delivery of the deed which was deposited in the bank gave any title to Mary Jennings

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by itself, but it is insisted that, when taken in connection with the will, it must be treated as incorporated in the will, and, so far as it is necessary, should be given full effect to carry out the desire of the testator as expressed in the will. Counsel for appellant concede the general legal proposition that a testator may by apt words refer to any written paper, deed or otherwise, in such a manner as to incorporate it into his will, but it is insisted that there cannot be found within the four corners of the will in question a single sentence which can be construed into a statement of intent to convey or devise by his will any real estate. It is the contention that the recital in a will that a deed has been given, which statement subsequently it is discovered is erroneous, does not disclose a purpose or intention on the part of a testator to give the same property by will, and the case of *Smith* v. *Smith*, 113 Md. 495 (31 L. R. A. [N. S.] 922), is called to our attention. In that case the court quotes liberally from the case of *Zimmerman* v. *Hafer*, 81 Md. 347, which it is insisted is almost identical with the case at bar. In that case the recital in the will reads:

"Whereas, I have this day made and executed a deed conveying to J. Monroe Zimmerman the farm whereon I now reside, I do hereby give and bequeath unto him, the said James Monroe Zimmerman, all my personal property of whatever description and wheresoever situate. I thus give to the said J. Monroe Zimmerman all my property and estate because," etc.

It is clear from this language that the testator supposed he had conveyed the land in question and that there remained nothing to give validity to the transfer. Such was also the situation in the case of *Noble* v. *Tipton*, 219 Ill. 182 (3 L. R. A. [N. S.] 645, where it was held that the recital in the will of a conveyance of land to a certain person is not effective as a devise if the conveyance proves ineffectual. It is insisted, however, and we are inclined to agree, that the will

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now before us clearly shows the intention of the testator to dispose of the farm to his daughter. The will by its terms, conceding, without deciding, that the deed is invalid, disposes of the farm in question to Mrs. Jennings. It expressly says:

"It is to be understood by this that all my property" —not *personal* property—"not already disposed of by deed is to go to my daughter, Mary Jennings aforesaid, in consideration for services rendered and from the fact that I have already given my son his full share."

In the other paragraph above set forth we also find this expression:

"These deeds, with the above mentioned personal property, dispose of my entire possessions *exactly as I wish,*"

and his purpose to carry this intent into effect is also disclosed by his direction, where he says:

"This disposition is to be made by placing the deeds on record and turning over the personal property as above directed without any necessity of probating the estate, as by so doing *everything is disposed of as I wish it.*"

Whether or not the deed should be incorporated as a part of the will, is, in our opinion, to be determined by the test of whether or not the will itself showed an intention on the part of the testator to dispose by the will of the property described in the deed. That this was the intention of the testator seems, as we have said, to be clear from the language of the will, although perhaps the expressions are rather inartificial and not as plain as they might be. The paragraphs of the above will cannot, however, be read without clearly carrying the conviction from the language that the testator intended thereby to give to his daughter the land described in the deed and which is the property here involved.

Neither are we impressed with the claim of the

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appellant that the question of delivery of the deed from Mary E. Jennings to plaintiff was, under the facts of this case, a question of fact for the jury and should have been submitted to them for determination. It is conceded that a deed is valid between the parties thereto without witnesses or acknowledgment, and the question whether a deed is entitled to record which is acknowledged and witnessed in the manner that this instrument was, is not before us. It does not seem to be disputed that Mary E. Jennings executed the deed of the farm to the plaintiff and delivered the same to him before her death. It was in his possession at the time of her death and was in his safety deposit box at the bank. It was not among her papers and was not in her possession nor in the possession of a third party for her.

Counsel for appellant on the trial of the case sought information with reference to another deed from Mr. Jennings to Mrs. Jennings of another separate parcel of land, which was executed at the same time that the deed in question was. This was objected to on the ground that it was incompetent and immaterial and had no bearing upon the delivery of the deed from Mary E. Jennings to John Jennings. This ruling of the court is complained of because it is insisted it was a proper subject of inquiry, but we are of the opinion that the court ruled properly in holding that the inquiries were not pertinent to the issues here involved.

It was not error, under the facts of this case, for the court to determine the question of whether or not this deed had been delivered, without submitting it to the jury.

Finding no error, we are constrained to affirm the judgment of the court below.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

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HERBERT *v.* LAKE SHORE & MICHIGAN SOUTHERN RAILWAY CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—NOTICE—SUFFICIENCY.

   An award of compensation by the industrial accident board, under the workmen's compensation law, unsupported by any evidence that the statutory notice required by section 15, part 2, of the act (2 Comp. Laws 1915, § 5445), was given by the injured employee or any one for him, or that the employer had notice or knowledge of the injury under section 18 (2 Comp. Laws 1915, § 5448), will be set aside by the appellate court on certiorari to review the award.

2. SAME—NOTICE TO INFERIOR SERVANT.

   Notice of an injury received by a yard conductor to a switchman, who was a subordinate employee, cannot be held to be notice to the employer, rendering the latter liable under the workmen's compensation act.

3. SAME—NOTICE—SUFFICIENCY.

   Testimony of a casual conversation between the injured employee and a superior, in which the fact of injury was mentioned, the exact time of which he was unable to fix, but which was at least seven or eight months after the alleged injury, *held*, insufficient notice of the injury to bind the employer under the workmen's compensation law.

4. SAME—FINDINGS OF INDUSTRIAL ACCIDENT BOARD—EVIDENCE—REVIEW.

   Findings of the industrial accident board, unsupported by competent evidence, are not binding upon the Supreme Court.

Certiorari to Industrial Accident Board. Submitted January 25, 1918. (Docket No. 85.) Decided March 27, 1918.

Catherine Herbert presented her claim for compensation against the Lake Shore & Michigan Southern Railway Company for the accidental death of her husband in defendant's employ. From an order awarding compensation, defendant brings certiorari. Reversed.

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Angell, Bodman & Turner and *C. G. Dyer,* for appellant.

Ralph S. Moore and *P. L. Sawyer,* for appellee.

KUHN, J. Certiorari to the industrial accident board. The claimant is the widow of Oliver Herbert, deceased, a former employee of the Lake Shore & Michigan Southern Railway Company, the defendant and appellant herein. He had been employed as a switchman and yard conductor for a period of about 14 or 15 years, and in the capacity of yard conductor he had charge of the yard engine and the work done by it. During the year 1915 he had complained of a hernia to several employees, which fact was called to the attention of the claim agent of the defendant, who advised him to have an operation, which operation was subsequently performed, on January 22, 1916. It appears that the claimant had been addicted to the intemperate use of intoxicants, and after the operation delirium tremens resulted and lobar pneumonia followed, causing his death on January 25, 1916.

On May 11, 1916, a notice to the defendant of claim for injury was brought to the attention of the defendant by the industrial accident board, in which the date of the accident was given as November 8, 1914, and the nature of the injury as a severe strain causing hernia, which resulted in death on January 25, 1916. No notice of any injury had ever been given to the defendant in writing and this was the first notice that was served on it that any injury was claimed to have occurred on the day mentioned in the notice or that any claim for compensation was based thereon. Upon receipt of notice of this claim, the defendant advised the industrial accident board that it took the position that it was not liable to pay compensation. On December 9, 1916, an application for

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adjustment of the claim was filed with the industrial accident board, in which the date of the alleged injury was given as on or about the 8th day of December, 1914. The committee of arbitration was duly formed in accordance with the provisions of the act, and the matter proceeded to a hearing on its merits. The date of the alleged injury was not shown definitely by the testimony, and in so far as it was shown, did not correspond either with the date given in the notice of injury or the application for arbitration. At the conclusion of the hearing before the committee on arbitration, the committee decided that the claimant was not entitled to receive or recover from the defendant any sum of money whatsoever, for the reason that no notice of the accident was given within three months; that the employer had no knowledge of the accident, and that there was no competent proof of an accident. An appeal having been taken to the full board, an order was duly entered that the award of the committee on arbitration be set aside and that the claimant receive and recover from the defendant compensation at the rate of $10 a week for a period of 300 weeks. The board, in support of its award, filed a comprehensive finding of facts and of their conclusions. The following finding of fact was made:

"That within three months, and in fact almost immediately, said employee reported the accident to his employer and made a claim against the employer for compensation under the workmen's compensation law."

In another portion of their findings the following is found:

"That he reported the accident to the proper official of the respondent company, at just what time does not appear, but we think he reported it at the proper time."

The workmen's compensation act (part 2, §§ 15, 18, 2 Comp. Laws 1915, §§ 5445, 5448) provides:

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"SEC. 15. No proceedings for compensation for an injury under this act shall be maintained, unless a notice of the injury shall have been given to the employer three months after the happening thereof, * * *

"SEC. 18. * * * Want of such written notice shall not be a bar to proceedings under this act, if it be shown that the employer had notice or knowledge of the injury."

We have held that the notice referred to in section 16 is clearly the notice required by section 15 to be given, and that the word "within" must be supplied in section 15, making the section read:

"Unless a written notice of the injury shall have been given to the employer within three months after the happening thereof."

See *Purdy* v. *City of Sault Ste. Marie*, 188 Mich. 573.

We are unable to find in this record, nor has our attention been called to any facts by claimant's counsel, that would support the finding of the industrial accident board that notice was given to the employer within the statutory period, or that the employer had notice and knowledge of the injury within the period named in the act. It appears that the deceased mentioned his alleged injury to two employees of the defendant, one the witness Kelleher one and a half days after the alleged accident, and the other the witness Bennett some time in the summer or fall of 1915, after the alleged accident. It appears that Kelleher was not an officer of the company nor a proper person to whom to report the injury. The testimony is conclusive that he was working as a switchman under the deceased, who was acting as yard conductor, and, being a subordinate employee, notice to him cannot be held to be notice to the company. See *Armstrong* v. *Pickle Co.*, 197 Mich. 334; *Kutschmar* v. *Manufacturing Co.*, 197 Mich. 146. In reference to the witness Bennett, it appears that he was a general yardmaster, and conceding, for the purposes of this case,

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that he was a proper person to whom a report of an injury should be made, the record seems to be undisputed that no report of an injury as such was ever made to him and that the only knowledge he had thereof was the result of a casual conversation with the deceased. It is true he was unable to fix the exact time, but at no place in his testimony does he say that this conversation or notice of the accident took place earlier than June, 1915, which makes it at least seven or eight months after the alleged injury, the only testimony concerning which showed that it occurred some time in October, 1914.

The finding of the board with reference to the time and sufficiency of the notice, finding no support in the record by competent evidence, is not binding upon this court. See *Armstrong* v. *Pickle Co., supra.* We are of the opinion that the arbitration board was correct in holding that there was no such notice, and that the industrial accident board erred in making the award.

The award must therefore be, and is hereby set aside.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

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MENDEL v. POLAND.

1. ADVERSE POSSESSION—HIGHWAYS AND STREETS—EVIDENCE—SUFFICIENCY—INJUNCTION.

In an action to restrain a township highway commissioner from removing certain fences enclosing part of the highway claimed to be owned by plaintiff by adverse possession, evidence *held*, insufficient to establish title by adverse possession.

2. SAME—PUBLIC LANDS—STATUTE.

It is no longer possible in Michigan to obtain title by adverse possession against the public. Act No. 46, Pub. Acts 1907 (3 Comp. Laws 1915, § 12311).

3. SAME—HIGHWAYS AND STREETS—SUFFICIENCY OF PROOF—NOTICE.

Where one seeks to obtain lands against the public by adverse possession of a part of a highway or street, the possession should be of such character, and under such circumstances, as to warrant the conclusion that the municipal authorities must be held chargeable with notice of the adverse possession and with acquiescence therein; and in order that the occupancy may ripen into a title it is necessary that all the elements be clearly established, that is, the possession must be actual, continuous, visible, notorious, distinct and hostile to that of the public.

4. SAME—HIGHWAYS AND STREETS—PERMISSIVE USER.

Where the original owner of the land testified that he intended to give two rods as his share of the highway, and he thought he placed the fence upon the proper line, and no claim was made by him or his successors in title to any property belonging to the highway, which the fences enclosed, plaintiff and her predecessors had only a permissive occupancy of the highway occupied by them, which ceased when the public, through its proper officers, demanded the use of the entire highway.

Appeal from Muskegon; Sullivan, J. Submitted January 17, 1918. (Docket No. 109.) Decided March 27, 1918.

Bill by Mary Mendel against Charles Poland, high-

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way commissioner of Norton township, to enjoin the removal of certain fences. From a decree for plaintiff, defendant appeals. Reversed, and bill dismissed.

R. J. MacDonald (*William H. Simpson*, of counsel), for plaintiff.

Carpenter & Jackson, for defendant.

KUHN, J. The plaintiff is the owner and occupant of the southeast quarter of the northeast quarter of section 19, in the township of Norton in Muskegon county. A public highway, surveyed and laid out with a width of 66 feet, runs along the north side of plaintiff's farm on the eighth line of the section, and another along the east side of her property on the section line. In the year 1915 plaintiff tore down the old, dilapidated fencing along the north and east sides of her farm and constructed strong and substantial fences on both of said sides. The one on the north side, according to the testimony of the township officials, encroaches about seven feet, and the one on the east side about eleven feet, upon the highways respectively adjoining.

On September 12, 1916, the defendant, who is the commissioner of highways for the township of Norton, made two orders requiring the plaintiff to remove, within 30 days, the said encroaching fences. On November 8, 1916, plaintiff filed a bill to enjoin the defendant from forcibly removing these fences, alleging as the ground for her bill that the land enclosed thereby, which is claimed to be a part of the highway,

"Is the property of this plaintiff by adverse possession, she being the owner thereof and the right of her fences established upwards of 40 years ago, and her right and title have ripened by adverse possession into absolute title thereto and cannot be disturbed by the said highway commissioner by his threatened action, and her right to continue fences on said highways at

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the places aforesaid has become fixed and established so far as this threatened action of the defendant is concerned."

Upon the filing of her bill a temporary injunction was issued restraining defendant from tearing down, destroying or removing said fences, and after a full hearing of the case the circuit judge entered a decree in favor of plaintiff, making the injunction permanent.

The testimony showed that one Ezra E. Tyler, a former owner, was the man who cleared the farm and built the first fences; that he gave two rods off the north of the farm for highway purposes; that the surveyor who surveyed the road showed him where the corner was, and he built the fence according to that line along the north of his farm; that he set out a row of trees inside this fence; that he also set out a row of trees along the east side of the farm and built a barb wire fence along that side about two feet outside the row of trees; that he had recently inspected the present fences, and they appeared to be located where the fences he built were located; that he sold the farm in 1883 or 1884. It further appeared that a Mr. DeVries, who later bought the place and moved on to it in 1891, found the old fences built by Mr. Tyler in a dilapidated condition; that he made some repairs to the north fence, and also ran some barb wire on the row of trees running parallel thereto to make a lane through which to drive cattle; that the outside fence was 7 or 8 feet from the row of trees; that a portion of the fence on the east side was down, and instead of putting in new posts, he tacked the wires onto the trees that stood a foot or two inside the fence line; that the old fence went clear around the place; that the new fence built by Mrs. Mendel appeared to be in the same place as the old fence. Plaintiff's son, Walter Mendel, testified that

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he built the new fence on the line of the old, except that he removed the wires nailed to the trees on the east side of the farm and put in posts and replaced the fence about where the old one was originally built. Mrs. Mendel bought the farm in 1910 and moved onto it in the spring of 1911.

Defendant and his two witnesses, former township officers, did not contradict the above testimony, except that they claimed that the old fence on the north line was crooked and that Mendel built the new fence on a straight line, thereby enclosing from one to three feet more of the highway; also that at the corner where the two highways intersected, he had run the corner post about four feet into the traveled part of the highway. As to this latter point, Mendel claimed the corner post was where the old one had been and that the traffic had been gradually encroaching on their property since the corner of the old fence went down.

The defense introduced testimony and elicited admissions tending to show that until recently little attention had been paid in that locality to highway lines; that fences were not constructed with reference to them; that many owners cultivated almost up to the traveled portion of the highways; and that such fences as had been constructed, most of which were old, were erected for the purpose of keeping in stock, etc., and not with any idea of asserting a claim of ownership to the fence line. As to the north fence, Mr. Tyler testified, on cross-examination:

"I designed to give two rods for my share of the highway.

"*Q.* (by plaintiff's attorney) As indicated by Mr. Porter, the surveyor?

"*A.* Yes, sir.

"*Q.* (by defendant's attorney) Well, whether Mr. Porter indicated or not, you intended to give two rods for the highway, didn't you?

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"*A.* I suppose I would do what other people—I am a law abiding citizen and do what other people do."

And Mr. DeVries, on cross-examination, admitted:

"*Q.* You didn't know, did you, where the lines were?
"*A.* No, sir, we didn't bother with it. No one ever brought any complaints.
"*Q.* And you never knew whether they were on the lines or off the lines?
"*A.* No, sir, we didn't know anything about it.

* * * *

"*Q.* You never made any claim, you or your father, did you—
"*A.* No, sir.
"*Q.* —that you could hold that line as against the public and the highway.
"*A.* Why, no, we didn't know. We kept the fence right there."

Moreover, a former highway commissioner, Mr. Jacob Bosma, testified to the following conversation with Mr. Derk DeVries, the father of the last named witness, and at that time the owner of the farm:

"I know Mr. DeVries. I remember having a conversation with him at one time in regard to this fence on the north side of the place. It was right by the farm. He was fixing up the fence, was building it, and I asked him if he wasn't out in the road. He said he didn't know, but he said, 'I am just fixing it up for a lane to let my cows down. I don't think it will do any harm.' He said, 'It will be tore down, probably, in a year or two.' I told him I didn't know as it would. I was highway commissioner at that time."

As to the fence on the east side, on cross-examination, after going over the condition and location thereof, witness Walter Mendel testified:

"*Q.* And that constituted the fence enclosing the place, did it not, so far as there was one?
"*A.* Why, it was there. We didn't consider it any more than to keep things out, that is, in the line of stock. It was simply there.
"*Q.* You didn't consider it a fence, then?

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"*A.* No, sir.
"*Q.* Nor as marking the line?
"*A.* What is that?
"*Q.* There was no other enclosure on that side, was there, when you went there, anywhere along that side, no other fence?
"*A.* Why, yes.
"*Q.* On the east side I am talking about.
"*A.* From the north corner to these here biggest trees there was an old fence, and then continuing past the big trees to the south corner there was also a fence."

And after going into detail as to these fences he continued:

"*Q.* And that fence with those posts is the one you said that if you had continued it north on the line that it was on, it would have crossed the road opposite your northerly line?
"*A.* Yes, almost.
"*Q.* So that you didn't consider that that fence was on the highway line, did you?
"*A.* I didn't consider anything."

And again:

"*Q.* Now, when you built that fence on the east a year or two ago, you didn't put it along where those trees were and where the other wires were?
"*A.* You hardly could.
"*Q.* Well, you didn't, did you?
"*A.* No, sir.
"*Q.* How far out did you put it?
"*A.* I went out just as far to miss the big branches."

And later:

"*Q.* How did you happen to place that north and south fence on the east side of your land just exactly where you did place it?
"*A.* Why, I followed the course that—I didn't want to nail this fence to the trees because it would spoil the trees, and also, because those big branches—every once in a while a tree maybe about four feet from the bottom will have a big branch out, and you nail a five foot

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wire to that and it is going to spoil it, isn't it? I just put it out far enough to miss these big branches.

"*Q.* In other words, you put it out in the first convenient place to put it?

"*A.* Yes, sir."

While it appears without question that a part of the highway both on the north and east side of the farm was occupied by the plaintiff and her predecessors in title, nevertheless we are not of the opinion that there was enough evidence to establish title to the parts of the highways in question by adverse possession. By the decisions of this court, when it was clearly established, it has been permitted to obtain such a title to the public highways, but, as was said in *City of Mt. Clemens* v. *Sanitarium Co.*, 127 Mich. 119:

"The propriety of permitting title to be obtained in this way to the public highways is of more than doubtful expediency."

By legislative act (Act No. 46, Pub. Acts 1907; 3 Comp. Laws 1915, § 12311) this was corrected, and it is no longer possible in this State to obtain title by adverse possession against the public. In the case of *Village of Red Jacket* v. *Pinton*, 126 Mich. 197, it was said:

"When one seeks to obtain land against the public by adverse possession of a part of a street, he should make out a clear case, and the possession should be of such a character, and under such circumstances, as to warrant the conclusion that the municipal authorities must be held chargeable with notice of the adverse possession and with acquiescence therein."

So that, in order that the occupancy of the premises in question ripen into title by adverse possession, it was necessary that all the elements must be clearly established, that is, the possession must be actual, continuous, visible, notorious, distinct and hostile to that

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of the public. The testimony of Mr. Tyler discloses that, at the time he built the original fences, it was his intention to give to the public the two rods as his share of the highway, and it is simply his claim that he thought he placed the fence upon the proper line bounding the highway, and no claim seems to have been made by him nor by his successors in title that they desired to have any property belonging to the highway nor that they occupied any part of the highway with any intention of holding it in a manner hostile to the public right. The distinction between obtaining title by adverse possession as against an individual and gaining title to a portion of a city street as against a municipality was clearly pointed out in the opinion of this court in *Crosby* v. *City of Greenville*, 183 Mich. 452. We think that the plaintiff and her predecessors only had a permissive occupancy of the highway occupied by them, which ceased when the public through its proper officers demanded the use of the entire highway. See *Weber* v. *City of Detroit*, 159 Mich. 14; *Pastorino* v. *City of Detroit*, 182 Mich. 5; *Conner* v. *Railroad Co.*, 183 Mich. 241; *City of Ann Arbor* v. *Real Estate Co.*, 189 Mich. 165.

We are of the opinion that the lower court erred in granting the relief prayed for, and are of the opinion that the plaintiff has failed in sustaining her claim, and that her bill of complaint should be and is hereby dismissed, with costs to the appellant.

OSTRANDER, C. J., and BIRD, MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred.

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MARSH v. KENT CIRCUIT JUDGE.

1. MANDAMUS—ANSWER—FAILURE TO DENY.
   Statements in the answer, in mandamus proceedings, not traversed by relator, must be taken as true.

2. SAME—COURT RULES—FAILURE OF RELATOR TO COMPLY—SETTLEMENT OF CASE FOR APPEAL.
   Mandamus will not lie to review the action of a circuit judge in extending the time for settling the record in a case for appeal, where such postponement was made necessary by relator's failure to furnish the adverse party with the stenographer's notes in compliance with section 3, Circuit Court Rule No. 66, in time to permit reasonable examination and comparison.

Mandamus by Frankie E. Marsh to compel Willis B. Perkins, circuit judge of Kent county, to settle and sign a record on appeal. Submitted March 5, 1918. (Calendar No. 27,883.) Writ denied March 27, 1918.

Eugene Carpenter, for relator.

PER CURIAM. Relator sets out that within 20 days after the entry of decree, and on February 19, 1917, there was presented to Hon. Willis B. Perkins, one of the judges of the Kent circuit court, a proposed case on appeal to be settled, due notice of the said application having been given. The cause was heard by Judge Mayne, of another circuit.

Relator sets out, among other things, the following:

"Your petitioner further shows that her said application to have the testimony taken herein upon the said accounting settled for such appeal was presented by her attorney, Eugene Carpenter, to the Honorable Willis B. Perkins, circuit judge of the seventeenth judicial circuit, on Monday, the 19th day of February, 1917, at the circuit court rooms of said county of Kent, Michigan; and that upon the claim of the at-

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torneys for said defendant and appellee that the proposed record had been served upon them by piecemeal, a part at a time, properly paged, before that time, and not altogether bound up in book form, the said circuit judge did then and there refuse to settle and certify this case for such an appeal, and which would and did thereby prevent and delay your petitioner in having this case reviewed on such an appeal by the supreme court at the 1917 April term. But that the said circuit judge did at that time and place make an order extending the time for the settlement of this case for such an appeal for a period of 30 days or to and including the 28th day of March, 1917, and requested your petitioner's counsel to serve such proposed record again upon the attorneys for defendant and appellee altogether at one time and bound up in book form, which your petitioner claims was a somewhat technical requirement under such a rule of practice, when taking into consideration that the attorneys of the defendant and appellee had taken from the clerk of the court's office all of the original depositions taken and filed therein in this case and all of the original exhibits, books, papers and documents used as proofs on such an accounting and was then concealing the same for the purpose of preventing the plaintiff's attorney from preparing the record of testimony for such appeal, and which has delayed your petitioner in having this case reviewed at the 1917 April term of the Supreme Court; although her attorney has fully complied with the said last mentioned order and did within the 30 days mentioned therein serve upon the attorneys for defendant and appellee two copies of a full and complete printed record and transcript of all the testimony, depositions, proofs, exhibits, books, letters, papers and documents used or offered as proofs and testimony by either party upon the said accounting had herein, bound up in book form, and did also within the said 30 days have the said record printed, bound up in book form and filed with the clerk of the Supreme Court, and a return of the case made of this case to the Supreme Court, and the proper fees paid for the making of such return, and for having this case docketed in the Supreme Court, and the same duly noticed for hearing at the 1917 April term, and

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placed upon the calendar for hearing, and the plaintiff's brief for such hearing printed and the proper number of both records and briefs filed with the clerk of the Supreme Court, and served upon the defendants and appellee's attorneys within the said 30 days and before the first day of the 1917 April term of the Supreme Court, and ready for hearing at the said April term, so far as the plaintiff is concerned."

In answer to the order to show cause, granted April 20, 1917, Judge Perkins denies the truth of the averment above set out in so far as his action is concerned and says, and there being no traverse, we must accept the answer as true, that on February 19, 1917, both parties appearing, he learned that relator had not complied with section 3, Circuit Court Rule No. 66, in that relator had not furnished the adverse party the stenographer's minutes for inspection and use in the preparation of amendments to the proposed case, and thereupon made an order extending the time for settling the case 30 days from February 21, 1917, to enable relator's counsel to serve the said transcript of testimony. Respondent has no knowledge, he says, about what, if anything, relator has since done in the premises and has not since been asked to settle the case.

There has been unpardonable delay in bringing this motion on for hearing. The printed record was filed September 26, 1917, and relator's brief was delayed until March 4, 1918.

It seems to be the contention of relator that having, as he says, incorporated all of the testimony in his proposed case, and having produced, upon the day noticed for settlement of the case, the stenographer's minutes of testimony, he had complied with the rule; in this respect saying, in substance, that when the case proposed contains all of the testimony there can be no occasion for the adverse party to make amendments.

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But the adverse party has the right to make comparison of the case presented and the testimony—to verify the claim that it contains all of the testimony. For this purpose the rule must be construed to mean that the adverse party be given possession of the stenographer's minutes for such reasonable time as will permit the required examination and comparison. Counsel for relator differently construes the rule.

In the light of the answer, the matter appears to be a very simple one, about which this court should not have been troubled, and in which no right to the order to show cause is made out.

The writ is refused, with costs to the party adverse to relator in the principal suit.

KUICK *v.* CITY OF GRAND RAPIDS.

1. MUNICIPAL CORPORATIONS—SEWERS—CHARTER PROVISIONS.
   In proceedings to establish sewers cities must observe the charter regulations, and the different steps should be taken in the order prescribed and in strict observance of the same.

2. SAME—EXTENSION AND IMPROVEMENT OF EXISTING SEWER.
   That a sewer has been constructed for some distance in a city street does not prevent its extension and enlargement, as the necessities of property owners farther out on the street may require, or the public health may demand.

3. SAME—SEWERS—VESTED RIGHTS.
   Property owners on the street did not own the tile and had no vested right to have the old sewer maintained.

4. SAME—NECESSITY—JURISDICTION—RESOLUTION OF COUNCIL—INJUNCTION.
   In proceedings by property owners to have declared void an

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assessment for a sewer tax and to enjoin the collection of the same, where the sewer was built according to the plans, under plaintiff's observation, and no one was deceived as to the nature of the actual improvement, it cannot be contended that the resolution declaring the improvement a public necessity was insufficient to confer jurisdiction because it provided for lowering the existing sewer, while in fact it was also enlarged and extended and the tile in the old part was either destroyed or used in constructing the extension.

5. SAME—SEWERS—BENEFITS.

Nor could it be seriously contended that plaintiff's property was not benefited by the improvement.

6. SAME—ASSESSMENT ACCORDING TO BENEFIT—PRESUMPTIONS—EVIDENCE.

Where the assessment was ordered by the city council to be made according to benefits, it will be presumed that the same was done, in the absence of any testimony to the contrary.

7. SAME—ABATEMENT OF TAX—EQUITY.

The validity of the special tax roll is not affected by the fact that the council was or will be influenced, upon equitable considerations, to abate what plaintiffs would otherwise have to pay by reason of the fact that they had once paid a tax for the old sewer.

Appeal from superior court of Grand Rapids; Dunham, J. Submitted January 16, 1918. (Docket No. 96.) Decided March 27, 1918.

Bill by John E. Kuick and others against the city of Grand Rapids and another to set aside the proceedings for the assessment and collection of a sewer tax. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

S. Wesselius and *Dorr Kuizema,* for plaintiffs.

Ganson Taggart, City Attorney, and *Charles A. Watt,* Deputy City Attorney, for defendants.

OSTRANDER, C. J. In the city of Grand Rapids, West Leonard street extends from Bristol street, the city

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limits on the west, eastward, and it seems from the plat found in the record that it intersects, first, West Street, then Powers street, and then Tamarack street, which last named street makes the eastern boundary of the district about which we are concerned. The west 800 feet fronting West Leonard street on the north and south is a cemetery, Frederick street opens out of West Leonard on the north and White street on the south, in the district west of West street.

It appears that in the year 1901 a sewer was constructed in West Leonard street from Tamarack to West, its size from Tamarack west to Powers street being 24 inches, and from Powers to West street 18 inches, and for the purpose a sewer district was made, upon which the cost of construction was assessed. The old sewer emptied at Tamarack street into a 9-inch sewer, causing some trouble at times, backing up water and flooding cellars on the West Leonard street line. Before the events related hereinafter this defect had been remedied. It is perhaps a necessary implication from the facts testified to that a natural water course existed on Tamarack street, that it was converted into a sewer in some way, and that the flow from the West Leonard street sewer was thereafter taken care of. There is testimony, not disputed, to the effect that thereafter the West Leonard street sewer, as it was constructed, answered its purpose and the needs of property connected with it.

In June, 1909, a resolution of the common council was adopted which requested the board of public works to furnish an "approximate estimate" of the cost of lowering the sewer and laterals in West Leonard street running from Tamarack west to West street and the construction of a sewer in West Leonard street from West street to the east line of Greenwood cemetery, necessary storm water conduits, branches, manholes and laterals, etc., "the construction of said sewer

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being a necessary public improvement." Pursuant thereto, a report was furnished, the approximate estimate of cost being $11,310. Of date October 4, 1909, the common council resolved that the lowering of the said existing main and lateral sewers and the construction of the sewer from West street to the east line of the cemetery, including catch basins, etc., "is a necessary public improvement." Then, October 25, 1909, a contract was reported and presented to the common council for construction of the improvement, the approximate cost stated being $10,633.26. It was approved and the mayor empowered to execute it for the city. In order, there followed action of the common council as follows: In December, the committee on districts was asked to locate a district to be assessed for the said improvement, in the same month $1,000 was transferred temporarily from the sixth ward highway fund to the West Leonard street, Tamarack and West street sewer fund, "to be credited *pro rata* to the property owners between Tamarack street and West street as assessed for construction of said sewer, to be reimbursed later from the Second Sewer District fund"; in January, the committee on districts made a report, fixing a sewer district, and the report was adopted. Final estimates of cost were submitted May 23, 1910, the total cost being $11,980. In June, 1910, the entire cost as so reported was ordered assessed upon the owners and occupants of lands and houses benefited by the improvement, determined to be lands as reported by the committee on districts. The board of assessors was ordered to make the assessment "as nearly as may be" in proportion to benefits. The roll was presented in September, 1910, and the evening of September 19, 1910, fixed for hearing appeals and notice of the opportunity ordered given by publication. On the evening fixed, there were a number of appeals. Further action was from time to

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time postponed. It is apparent that the common council recognized some equitable or legal right of persons owning property abutting on the old sewer, to some credit on account of what had been paid for its construction, and the fact that some of the material in the old sewer was used in the new, at a point further west. The committee on appeals recommended, October 31, 1910, that the board of assessors furnish the committee with certain information, namely, amount of assessments of lots on both sides of the street from Tamarack to West street on the basis of 25 cents per front foot, including intersections, and West street to end of West Leonard street on basis of actual cost of sewer and 10 cents per foot, including intersections for trunkage; also the balance that would have to be paid from the general fund on this basis. The information was called for and was furnished. Sitting as a committee of the whole, the common council, December 27, 1910, recommended that the roll be set aside and a new one prepared assessing the cost of the improvement on the district as though the sewer was a new one, not taking into account the old sewer, and that property owners who had paid for the old sewer be given credit on the new roll for the amount of their assessments for the old sewer, and that the total of such credits, fixed at the sum of $3,110, be paid from the general fund. The testimony does not show that this report was adopted, but the answer of the city admits that it was. Following this, January 9, 1911, the common council by resolution ordered the total of the expense, $11,980, assessed upon owners and occupants of lands and houses in the district benefited by the improvement. A new roll was presented January 30, 1911.

It is inferred that the owners of property served by the old sewer on West Leonard street, if not antagonistic to the proposed improvement, were insisting

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that with respect to the cost thereof little or none of it should be assessed to them, and this upon the theory that the improvement did not in fact considerably benefit them or their property. Another contention was that material in the old sewer was used in the new one at a point further west in the street and that they ought to have some credit for the value thereof. A number of taxpayers appealed from the order confirming the first assessment roll, and when the second roll was confirmed 27 or more appealed, grounding their appeal upon the propositions:

"*First.* Because the construction of said sewer is of no benefit to our respective properties, and said assessment therefor is not based upon benefits derived.

"*Second.* The property owned by us was assessed for a sewer in said street in the year 1903, and which assessment was paid.

"*Third.* Because said assessment is not spread against our respective property for benefit received by it.

"*Fourth.* Because we were not notified for the proposed construction of said sewer and the same was constructed by said city without our consent.

"*Fifth.* Because we were assured, after said construction was let, by the aldermen of said ward and the chairman of said committee of the assessment district, that the taxes therefor would not exceed ten dollars per lot.

"*Sixth.* Because said assessment amounts to a practical confiscation of our property without corresponding compensation therefor.

"*Seventh.* Because said roll is irregular, not in conformity with the law, inequitable and unjust."

Meantime, the sewer had been constructed and, as the court below found, construction went on from day to day under the observation of the appellants, according to plans adopted by the city and on file in the proper office, so that no one was deceived about the nature of the actual improvement.

Thirty-five owners of property assessed for the im-

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provement joined as plaintiffs in the bill filed March 27, 1915, the purpose of which is to have declared void the proceedings for the assessment and collection of the taxes, and to enjoin further effort to collect the same. Fraud and deception are not charged. The issue joined having come on to be tried in open court, a decree was entered dismissing the bill. In the brief for appealing plaintiffs the propositions argued are:

(1) The new sewer was of no benefit to the property owners assessed therefor between Tamarack and West streets.
(2) The construction of the new sewer was not authorized by the resolution declaring the lowering of the existing sewer a necessary public improvement.
(3) The assessment was not according to benefits, and credits for the old sewer were not properly given.
(4) The property owners cannot be said to be guilty of laches and are not estopped from contesting the assessment.

Counsel do not much disagree about the law. It is agreed that there is a presumption in favor of proper, as distinguished from improper, official action and that taxpayers have the right to assume that such improvements will be made and the cost thereof levied and collected in accordance with the law. It is agreed that the assessment cannot exceed the benefit to be derived from the improvement and that the theory sustaining such levies is that the party assessed is locally and peculiarly benefited over and above the ordinary benefit which as one of the community he receives in all public improvements, to the precise extent of the assessment. *White* v. *City of Saginaw*, 67 Mich. 33; *City of Detroit* v. *Judge of Recorder's Court*, 112 Mich. 588; *City of Detroit* v. *Daly*, 68 Mich. 503. But in applying these rules it is necessary to observe some other rules. Cities must have sewers. The law, in this case the charter of Grand Rapids,

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has pointed out the steps which must be taken to secure them. These the officials must usually take in the order prescribed and in rather strict observance of the charter, exercising always good faith.

A study of the record has not convinced me that any of plaintiff's contentions ought to be sustained. The idea that their property was not at all benefited by the improvement is preposterous. The fact that a sewer has been constructed for some distance in a city street does not prevent its extension and enlargement as the necessities of property farther out on the street may require, or the public health may demand. The new improvement involved the old, and might of course destroy the old one entirely. In fact, it did destroy it, in this case, larger tile being used and laid at a greater depth than the old tile. Farther west, where the sewer was smaller, the old tile, all or some of it, was utilized. But plaintiffs did not own the tile and had no vested right to have the old sewer maintained. It is said that the jurisdictional step of declaring the proposed improvement a public necessity was not taken because the resolution provided for *lowering* the old sewer when in fact a new sewer was proposed and was constructed. The argument is based upon the notion that the term *lowering the existing sewer* means and must mean simply sinking it, and what is in it, to a greater depth. This is made evident by the following excerpt from the brief for plaintiffs:

"It will not do for defendant to say: 'It does not mean a great deal to the engineering department whether a sewer was spoken of as being a lowered or constructed sewer.' It does mean a great deal to the people affected, whose only notice is in the words of the resolution, who are not technical men, and who have not the advantage of private information and instruction as has the engineering department, that the thing apparently contemplated by a resolution is not the real thing that is to be done."

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Undoubtedly, the common council should not make a different improvement from the one declared necessary. But how does the case here stand? There was an old sewer in West Leonard street, perhaps 1,300 feet in length. West of its western terminus the street extended some 1,800 feet, and a sewer for that additional distance was desired—was deemed to be a public necessity. Engineering demanded a fall in the level of the sewer to the east. A proper fall (we must assume) carried it below the level of the old sewer, and proper size made the old 18-inch and 24-inch sewer too small. A sewer district had been created when the old sewer was laid, and it embraced nearly all of the territory put into the new district. All of these facts have significance when the language employed by the common council in describing the proposed improvement is read. The resolution implies that when finished there will be but one continuous sewer in West Leonard street, which will traverse the region occupied by the old sewer but be deeper in the earth than the old sewer is. I am impressed that no one should have been deceived by the language of the resolution and that it ought not to be held that the proposed and the declared improvement are two different things. It will be held, therefore, that jurisdiction to do what has been done was acquired, and that it is not made to appear that plaintiff's property was not benefited. This disposes of the contentions that the proceedings ought to be set aside and the city enjoined from collecting the cost of the improvement.

Assuming, what is questionable, that plaintiffs have the right, in this proceeding, to contest the amount of the assessment, they must at least point out either that the method of assessment adopted was all wrong or that, applying a proper method, a wrong result is apparent. This I think they have not done. An as-

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sessment according to benefits was ordered and presumably was made. That plaintiffs had once paid a tax for the old sewer is not of itself a reason for holding that the assessors have not performed their duty. The validity of the roll is not affected by the fact that the common council was or will be influenced, upon equitable considerations, to abate what plaintiffs would otherwise have to pay.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE and KUHN, JJ., concurred.

HILLMAN HARDWARE CO. *v.* DIETZ.

1. SALES—SUBSTITUTED GOODS—PLACE OF DELIVERY.
   Where part of certain building material and fixtures furnished by plaintiff to defendant for a barn were admitted to be unsuitable, without particular fault of either party, and plaintiff acquired, but had not delivered, others to replace the unsuitable ones, in a suit for the purchase price, *held*, that it was defendant's admitted right to have the new goods delivered at plaintiff's place of business, but not without first returning those for which they were to be substituted.

2. SAME—SUBSTITUTED GOODS—DELIVERY—DIRECTED VERDICT.
   While it cannot be told, until the experiment is made, whether the substituted parts will go with and fit those already furnished and in place, where both parties are standing upon their strict rights, and the evidence that the parts ordered are proper ones was uncontradicted, a verdict for plaintiff was properly directed by the court below.

Error to Ottawa; Cross, J. Submitted January 11, 1918. (Docket No. 59.) Decided March 27, 1918.

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Assumpsit by the Hillman Hardware Company against Louis F. Dietz on a promissory note. Judgment for plaintiff on a directed verdict. Defendant brings error. Affirmed.

Lillie, Lillie & Lillie, for appellant.

Dean S. Face, for appellee.

OSTRANDER, C. J. The testimony tends to prove that plaintiff sold to defendant and delivered to him certain personal property—principally building material and fixtures for a barn or barns. A promissory note was made by defendant, payable to plaintiff, for some of the debt incurred, and an open account, kept by plaintiff, evidences the remainder. It turned out that, without the particular fault of either party, rather by inadvertence, some of the fixtures ordered and delivered were not suitable—did not fit or suit the particular job—and that upon defendant's representations others were ordered from the manufacturer, who sent them to the plaintiff, which has them in its possession, ready to be delivered to defendant, without charge, whenever he returns the material and fixtures in place of which they were ordered. Defendant has demanded the new material and fixtures without returning, or offering to return, the property which he claims was unsuitable and to replace which the other was acquired by plaintiff, and upon the merits his defense is that the goods originally agreed to be furnished have not all been furnished and those furnished are useless to him until the substituted and later ordered parts are furnished. Out of these conditions defendant's alleged damages have arisen. This defense involves the proposition that it cannot be told until the experiment is made whether the new parts in plaintiff's possession will go with and fit into those already furnished and in place so as to properly com-

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plete the job, the evidence that they are proper parts, at least are those ordered by defendant, being, however, uncontradicted. The parties are standing upon their strict rights. Under the arrangement of the parties, it is not defendant's right to have the new parts delivered at his barn. As matter of law, it is not his right to acquire possession of them without returning those for which they are substituted. It is his admitted right to have the new material delivered at plaintiff's place of business upon the return of that first furnished. This being the law, it is not made to appear that the defendant, because of any fault of the plaintiff, has suffered any loss or injury. This was the ruling of the circuit court, a verdict for plaintiff being directed. It is doubtful if this ruling is properly challenged in the errors assigned and in argument. However, it was right and disposes of the case.

The judgment is affirmed.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

ALLEN v. HEFT.

1. EQUITY—JURISDICTION.

The rule that, having jurisdiction for one purpose, a court of equity may, and usually will, retain jurisdiction to settle the entire controversy, has no application in cases where equitable jurisdiction is not made out by the bill itself.

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2. EXECUTION — INJUNCTION — ADEQUATE REMEDY AT LAW — HUSBAND AND WIFE—EQUITY—JURISDICTION.

On appeal from a decree dismissing a bill by a wife to restrain the sheriff from selling an automobile levied on by a judgment creditor of the husband, where the ownership of the automobile is in dispute, plaintiff claiming that in its purchase the husband acted as her agent, and the conclusions that the automobile is necessary for her use in selling her farm products, and that the identical automobile is the only thing that will satisfy her just demands not being apparent from the bill of complaint or that her remedy at law is inadequate, the sheriff not being officially insolvent, the decree of the court below will be modified to the extent of dismissing the bill without prejudice to plaintiff's right to institute a suit at law.

Appeal from Kent; Brown, J. Submitted January 8, 1918. (Docket No. 5.) Decided March 27, 1918.

Bill by Minnie E. Allen against Israel N. Heft and another to enjoin an execution, levy and sale. From an order dissolving the injunction, plaintiff appeals. Modified and affirmed.

C. G. Turner, for plaintiff.

Corie C. Coburn, for defendants.

Plaintiff is the wife of Eli W. Allen. Israel N. Heft is a judgment creditor of Eli W. Allen. To collect his judgment, rendered in the year 1917, Heft caused an execution to be issued and delivered to the sheriff, who, on or about July 24, 1917, levied upon a motor car which Eli W. Allen had theretofore purchased from the Mt. Pleasant Motor Company. When he bought the car, the said Eli W. Allen paid for it $554.10 and gave his individual note to the vendor for $300. Later, Eli W. Allen began suit in the circuit court for the county of Kent against the said Mt. Pleasant Motor Company, claiming fraud on the part of that company in the sale of the said car, he having

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previously tendered the said car to said company and demanded from it a return of the money he had paid and his note. That suit is pending. The sheriff threatens to sell the car on the execution. The judgment creditor is financially irresponsible.

Plaintiff owns a farm and personal property thereon, and all income therefrom belongs to her. From time to time, Eli W. Allen, her husband, has acted as her agent and has been intrusted by her with money to purchase property for her. She gave him the $554.10 with which to purchase the said motor car and it was bought for her to be used by her in her business and for family use, and is necessary for her use in selling products of her farm. This was in September, 1915.

Briefly stated, the foregoing are the facts charged in plaintiff's bill of complaint, in which she prays that an injunction issue, directed to the sheriff and the judgment creditor, to restrain them from interfering with her custody of the car and from selling or attempting to sell it. There is a prayer for general relief. The injunction was granted and served, plaintiff later on, before motion to dissolve the injunction was heard, giving a bond conditioned to pay the damages and costs awarded to said Heft if she "failed to recover and maintain her action against said Israel N. Heft * * *." The judgment creditor answered the plaintiff's bill and moved for a dissolution of the injunction upon the grounds (1) that it states no equity, (2) plaintiff has an adequate remedy at law, (3) plaintiff is estopped by her conduct to claim ownership of the car. The court was advised, by affidavit, that Eli W. Allen applied for and obtained a license as owner of said motor car for the year 1917. The motion to dissolve was based, in part, upon the files and records in the case of Eli W. Allen *v.* Mount Pleasant Motor Company and Isabella County State

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Bank, which files and records are not made a part of the settled case on appeal. The injunction was dissolved, the bill dismissed, and plaintiff has appealed.

OSTRANDER, C. J. (*after stating the facts*). The contention of the appellant is that by the filing of the bill, the general appearance of defendants, the granting of an injunction, the filing of the answer, etc., the court became possessed of the case, acquired jurisdiction of the parties and subject-matter, and therefore has jurisdiction to give full relief other than that prayed for. The familiar rule is relied upon that having jurisdiction for one purpose a court of equity may, and usually will, retain jurisdiction to settle the entire controversy.

The rule, of course, has no application in cases where equitable jurisdiction is not made out by the bill itself. Upon the facts she alleges, plaintiff has apparently an adequate remedy at law, which is sufficient reason for refusing equitable interference. The sheriff is not, officially, insolvent. It is said that the identical automobile is the only thing which will satisfy plaintiff's just demands in this case, and that at least the cause ought to have been transferred to the law side of the court for trial. This conclusion is not apparent from the bill of complaint. Furthermore, the record does not contain all of the evidence upon which the court below proceeded.

I am inclined, however, to grant a modification of the decree to the extent of dismissing the bill without prejudice to plaintiff's right to institute a suit at law if she is so advised. In other respects, the decree is affirmed, with costs of this court to the appellee.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

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HOLBROOK *v.* OLYMPIA HOTEL CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EVIDENCE—NATURE OF EMPLOYMENT—QUESTION OF LAW.
   On certiorari to review an award of compensation by the industrial accident board, under the workmen's compensation act, to the widow of a painter and decorator who was accidentally killed while engaged at work for a hotel company, where the facts are undisputed, the question as to whether decedent was an employee or an independent contractor was a question of law.

2. SAME—CASUAL EMPLOYMENT—ASSUMPTION OF RISK—STATUTES.
   It is clear that, under the workmen's compensation act (sections 5427, 5429, 2 Comp. Laws 1915), it was contemplated that there may be an employment of labor, not in the usual course of the business of the employer, in which employment the risks of injury not occasioned by the employer's fault are assumed by the workman.

3. SAME—CASUAL EMPLOYMENT.
   The owner of a hotel is not pursuing his business, within the meaning of the workmen's compensation act, when he causes the rooms to be occasionally painted and decorated, although it is usual to have work of that nature done from time to time.

4. SAME—INDEPENDENT CONTRACTOR.
   Where the undisputed facts show that in doing work for a hotel company in painting and decorating its rooms from time to time as occasion required, deceased engaged his own men and controlled them, doing as much or little work personally as he pleased, although the work was to be done to the satisfaction of the manager of the hotel, who furnished the materials used, and deceased was paid so much per hour for the men engaged in the work, he was an independent contractor and not an employee within the meaning of the workmen's compensation act.

Certiorari to Industrial Accident Board. Submitted January 9, 1918. (Docket No. 24.) Decided March 27, 1918.

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Minnie A. Holbrook presented her claim for compensation against the Olympia Hotel Company for the accidental death of her husband in defendant's employ. From an order awarding compensation, defendant and the Hartford Accident & Indemnity Company, insurer, bring certiorari. Reversed, and award set aside.

C. H. Ruttle (*Guy W. Moore* and *Hal P. Wilson*, of counsel), for appellants.

Warren S. Stone, for appellee.

OSTRANDER, C. J. Arthur Lee Holbrook, a painter and decorator, living in Mt. Clemens, Michigan, while doing some work in the hotel of the Olympia Hotel Company, in that city, on September 25, 1916, fell from a ladder, receiving injuries from which he died. His widow, the claimant, seeks to recover compensation under the statute. The committee on arbitration refused to make an award, but the finding was reversed on appeal. The industrial accident board found:

"(*a*) That the deceased was an employee of the respondent employer and that the accident which befell him arose out of and in the course of his employment.

"(*b*) That the accident caused his death and that it was the proximate cause of his death, which occurred a few hours after the accident.

"(*c*) That his employment was not casual and that he was not a casual employee.

"(*d*) That the accident occurred and arose out of and in the course of the trade, business and occupation of his employer, the Olympia Hotel Company.

"(*e*) That the applicant was solely dependent upon the deceased and that she is entitled to all of the compensation.

"(*f*) That compensation should be paid by the respondents to the applicant for the period of 300 weeks at the rate of $10 per week."

Plaintiffs in certiorari, in the petition for the writ, allege:

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"(*a*) That Arthur Lee Holbrook was an independent contractor and not an employee of the Olympia Hotel Company, and as an independent contractor is not entitled to compensation under the terms of the workmen's compensation act.

"(*b*) That the industrial accident board erred in conclusions of law above set forth and erred in its findings hereinbefore complained of."

It is said in the brief that the point that the employment was casual is waived. To determine whether the deceased was an independent contractor, a mixed question of fact and law, requires examination of the testimony, all of which is returned. This discloses that the Olympia Hotel Company conducts a hotel. That is its business. The building in which the business is carried on seems to be of considerable size. The rooms were renovated occasionally with paint and paper, and it was the practice of the management to have the necessary work done, in one or in several rooms, as the business of the hotel permitted. Usually, at least, there was a period of time in spring and another period in the autumn, during which periods most of the work was done. When necessity demanded or convenience permitted the renovation of a room or of rooms the management secured the services of a painter to do the work, furnishing the material but not the tools for doing it. For a year or more prior to his death, Mr. Holbrook was the man to whom the doing of the necessary work was confided.

Mr. Holbrook carried on the business of painting and decorating, employing men, as many as eight at one time. Occasionally, he contracted to do a particular piece of work for an agreed sum, but most of his work was done, as all of it was for the Olympia Hotel Company, by the hour. He carried on different jobs at the same time, using his men on one or other of them as he pleased, changing them from one job to another. He was carrying on more than one job at

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the time he was injured. He went from job to job, superintending his men and himself doing work. He hired the men; they regarded him as employer, looked to him for their pay, and he paid them.

There was no written contract between Holbrook and the hotel company. He was not carried on the payroll as an employee of the company, nor was he otherwise than as stated in the service of the company. There was no understanding that he was personally to do any work. He was to get the work done, had absolute charge of it and of the men employed, the results to be satisfactory to the hotel company. By this latter statement is meant that in practice one, two, or more coats of paint might be ordered in a particular room until it looked good to the management, or a tint or color, use of which had been begun, might be ordered changed to suit the taste of the management. Impliedly, of course, he undertook to do a job in a proper, workmanlike manner. He rendered bills for the work done, which bills specified the total number of hours he and his men had worked, but not how many hours each had worked nor who were the men who worked. Some days Mr. Holbrook worked at the hotel a few hours while his men, or some of them, worked many hours. When he was absent, one of his men was left in charge and direction of the others and the work. Uniformly, by agreement, he charged 35 cents an hour for all work done, whether by himself or others, and he paid his men 30 cents an hour.

There is no dispute about the facts. There is no testimony tending to prove that the hotel company controlled or reserved the right to control the men, or the way in which they should do this work. The case presented by the facts is the common one of the house owner and the painter who do not contract to have done and to do a particular job for a lump sum, but

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do contract to have done and to procure to be done certain work at a stipulated price per hour for the time employed. Nothing is more common, nowadays, than for the house owner to engage some man whose business it is to see that certain desired painting, decorating, paper hanging is done in and about his house, or to see that storm houses and storm windows are put up in the autumn and taken down in the spring, when screens and awnings are installed in place of them, or to mow and trim the lawn. If the man once engaged produces the desired results for a fair sum, he is employed, if it is possible, year after year to do the work —to see that it is done. Nothing is more common than to charge and pay for such work a price per hour of time employed in doing it. Often, the man engaged, who is responsible for results, does not do the work himself and is not expected to do it. He has facilities, has men, has tools, and often has several jobs progressing at one time.

The facts being undisputed, the question presented is a question of law. In the opinion given by the board it is said:

"Under the manager of the hotel, Matthews, Mr. Holbrook operated as a foreman for the hotel company covering that class of work. He also acted for the hotel company as a sort of paymaster in paying off the men. He kept their time and knew how many hours each put in. He took the money from his employer, the Olympia Hotel Company, and distributed to each man the part that belonged to each man and kept the remainder for his services. The hotel company and all the men understood the arrangement and were satisfied with it. We have not quoted all of the testimony on the subject of the status of Mr. Holbrook, but we have quoted sufficient to show, in our judgment, that the deceased was not an independent contractor, but that he was an employee of the respondent hotel company. In *Tuttle* v. *Lumber Co.*, 192 Mich. 385, our Supreme Court said:

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"'We are of the opinion that the test of relationship is the right to control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent.'

"It is said in 26 Cyc., at page 966:

"'The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished; or, in other words, not only what shall be done, but how it shall be done.'

"In 26 Cyc. p. 1546, an independent contractor is defined as:

"'One who, carrying on an independent business, contracts to do a piece of work according to his own methods and without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work.'"

This is based in part, it is assumed, upon a finding of facts which reads:

"If the manager concluded that one coat of paint was sufficient, the painters would go to other rooms to work, and the manager was at liberty to take them from one room and put them on another at any time and to change the men around from room to room as he saw fit. If the manager did not think the rooms were properly painted he would direct them to put on other coats, and in some cases under his instructions the painters put on as many as four coats of paint to a room."

The finding of facts here set out is in effect a finding that the manager of the hotel was in control of the men employed by Mr. Holbrook, directing them in their work, with the right to interrupt it. In this sense, I do not find it supported by testimony. On the contrary, it appears that to Mr. Holbrook suggestions were made and that he or some one whom he left in charge of the work directed the men. And in any event the skill, the art, which the men possessed, probably in different degrees, how paint should be

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laid or paper hung—about these things, which, combined with the material furnished, produced the desired results, no one connected with the hotel undertook to control or direct the men or Mr. Holbrook.

The law provides, 2 Comp. Laws 1915, §§ 5427, 5429:

"The following shall constitute employers subject to the provisions of this act: * * * 2. Every person, firm and private corporation, including any public service corporation, who has any person in service under any contract of hire, express or implied, oral or written, and who, at or prior to the time of the accident to the employee * * * have elected to become subject to the provisions of this act" * * *.

"The term 'employee' as used in this act shall be construed to mean; * * * 2. Every person in the service of another under any contract of hire, express or implied, oral or written, * * * but not including any person whose employment is but casual or is not in the usual course of the trade, business, profession or occupation of his employer."

It is clear that the law contemplates that there may be an employment of labor, not in the usual course of the business of the employer, in which employment the risks of injury not occasioned by the employer's fault are assumed by the workman. It would seem that occasionally renovating the rooms of a building, or the building itself, owned and occupied by the owner as a home, with paint or paper or both, is not in the usual course of the trade, business, profession or occupation of the owner, unless he is himself in the business of painting and decorating. No reason can be found for concluding that the owner of a hotel is pursuing his business, within the meaning of the law, when he causes the rooms to be occasionally painted and decorated, although it is usual to have work of that nature done from time to time.

But, assuming that the claimant's decedent was doing work in the usual course of the business of the

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hotel company, he was not its employee within the meaning of the law, but was plainly an independent contractor, who, when material was given to him and rooms designated where it was to be used, undertook, by himself and others, with his own apparatus, and according to his own methods, to produce results. It is often helpful in seeking to determine whether, upon certain facts, the relation of master and servant exists, to consider whether the alleged master would be liable to third persons for misconduct of the alleged servant. In two cases, in which such a liability was asserted, it has been held that the alleged servant was an independent contractor upon facts which make the reasoning and conclusions of the court applicable here. These cases are *Gall* v. *Journal Co.*, 191 Mich. 405; *Burns* v. *Paint Co.*, 152 Mich. 613. See, also, *Perham* v. *Roofing Co.*, 193 Mich. 221.

The award is set aside.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

KALUCKI *v.* AMERICAN CAR & FOUNDRY CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—APPEAL FROM COMMITTEE ON ARBITRATION — CONCLUSIVENESS — LIMITATION.

   The decision of the committee on arbitration as to a claimant's right to compensation under the workmen's compensation act, filed with the industrial accident board, is final and stands as the decision of the board unless a claim for review is filed with the board in conformity with the provisions of section 5461, 2 Comp. Laws 1915.

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2. SAME — APPEAL — LIMITATION — EXCEPTION — "GOOD CAUSE SHOWN."

Where the claim for review is not filed within the seven days limited in the statute, the showing justifying the board in extending the time, under the proviso in said section, must be such as to present some legal basis recognized as authorizing the exercise of a judicial, or *quasi* judicial, function or judgment, and the board may not act arbitrarily without "good cause shown."

3. SAME.

Inability to furnish the money necessary to pay the expenses of such review is not a recognized legal "good cause shown" for extending the time, especially in view of the fact that a bare statement in writing of plaintiff's claim for review, which could be written in two or three lines, would, if filed with the board within the seven days, have preserved his right of review under the provisions of the statute.

4. SAME—LIMITATION OF ACTION.

Where plaintiff suffered an injury to his eye while in defendant's employ, and after treatment by its physician he continued at work, although the injury continued and finally resulted in the loss of the eye, and no claim for compensation under the workmen's compensation act was made until more than six months after the date of the accident, an award of compensation was barred by the provisions of the statute (section 5445, 2 Comp. Laws 1915). *Cooke* v. *Holland Furnace Co.*, *ante*, 192.

Certiorari to Industrial Accident Board. Submitted January 10, 1918. (Docket No. 36.) Decided March 27, 1918.

Joseph Kalucki presented his claim for compensation against the American Car & Foundry Company for injuries received in defendant's employ. From an order awarding compensation, defendant brings certiorari. Reversed.

Alexander, Cotter & MacCord (*G. A. Orth*, of counsel), for appellant.

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Leopold A. Koscinski (*Charles Bowles*, of counsel), for appellee.

STEERE, J. On July 29, 1914, while in defendant's employ as a car repairer, plaintiff struck with his hammer a highly tempered piece of steel from which a small piece, or pieces, broke off and flew into his left eye. He went to the "shop doctor" who cared for and bandaged the eye, directing him to go down town to the company's doctor for further treatment. He visited Dr. Palmerlee, the company's physician, to have his eye treated two or three times and then ceased going. He testified he thought he went three times. Dr. Palmerlee kept a record of the services rendered and testified that he treated plaintiff's eye but twice, the first time on July 31 and again on August 1, 1914; that he removed a small particle of steel from the eye on the first treatment, finding nothing to indicate anything else in the eye; that most any inflammation in the eye from a foreign substance would require more than two treatments and after the second plaintiff was told to come back for further observation but failed to do so. Plaintiff denied being told to return but admitted that when he left his eye was bandaged and that he later took the bandage off himself.

From the time of the accident plaintiff continued at his regular work without asking for further medical attention or notifying defendant of any trouble with his eye until about the first of October, 1914, when he and most of the other men in his department were laid off because of lack of work.

Defendant heard nothing further of him until the 9th day of June, 1915, when he served upon it notice of a claim under the workmen's compensation law for the loss of his eye, accidentally injured while in defendant's employ, on July 29, 1914, stating that said

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"injury gradually caused total blindness on about March 20, 1915."

Liability being denied, on September 9, 1915, plaintiff filed with the industrial accident board his claim and application for compensation based on the accident which occurred July 29, 1914. Pursuant to provisions of the workmen's compensation act a hearing was had before a committee of arbitration which, on October 14, 1915, determined that he could not be awarded compensation because his claim therefor was not made within six months after the date of the injury as required by the act he invoked which provides (section 15, part 2, Act No. 10, Extra Session 1912, 2 Comp. Laws 1915, § 5445):

"No proceedings for compensation for an injury under this act shall be maintained, unless a notice of the injury shall have been given to the employer three months after the happening thereof, and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same."

Plaintiff was represented by counsel at this hearing and advised "then and there" of his right to appeal and claim review of this decision before the industrial accident board, but no claim for review was filed within the seven days' limitation fixed by statute (2 Comp. Laws 1915, § 5461).

On, or some time after, November 3, 1915, plaintiff made application to the industrial accident board for extension of time in which to file a claim for review under the proviso of section 8, part 3 of the compensation act (2 Comp. Laws 1915, § 5461) "that said industrial accident board may, for sufficient cause shown, grant further time in which to claim such review." The record is hazy as to certain parts of this proceeding. An affidavit by plaintiff's counsel, dated November 3, 1915, asking for extension of time to

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November 6th, appears in the record with no indication as to when it was filed. A verified petition by plaintiff asking for extension of time, sworn to on January 10, 1916, follows this with no indication of when it was filed. The record next shows a motion by defendant's counsel, without date or mark of filing, asking that plaintiff's application for extension of time be dismissed for various stated reasons. There also appears in the record what is entitled an "application for review of claim before the full board," signed by plaintiff (by his counsel) and dated February 8, 1916, with no indication of when it was filed. On February 3, 1916, an order was entered by the board reciting that an application for extension of time had been filed by plaintiff and, parties having been heard, the application was granted extending the time for seven days from that date. The only claimed "sufficient cause shown" was lack of funds to "cover the expenses of transcript of record and other expenses incidental to such proceeding." Upon that proposition the affidavit of plaintiff's counsel of November 3d shows that on October 20, 1915, within the seven days, plaintiff notified his counsel that he would succeed in raising the necessary amount and on the 28th of October, 1915, counsel wrote the industrial accident board asking for blanks "of application of review of claim before the full board," which he received on the first of November, 1915, and immediately thereafter he "prepared his reasons for the application for review as aforesaid." It may be noted in passing that a bare statement in writing of plaintiff's claim for review which could be written in two or three lines, would if filed with the board within the seven days have preserved right of review under the provision of the statute.

On rehearing before the industrial accident board the decision made by the committee on arbitration

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was reversed and an award made of full statutory compensation for the loss of an eye on the theory, as appears by the opinion of said board filed in the case, that the accident and injury were not contemporaneous and the six months' statute of limitation providing for time in which to make claim for compensation began to run from the time plaintiff discovered the loss of his eye, which he testified was about March 15, 1915.

The legal propositions presented by defendant against the decision of the accident board are that no notice of the injury was given it within three months after the accident from which it resulted, nor claim of compensation made therefor within six months, and that the board erred in allowing plaintiff's petition for extension of time in which to file a claim for review of the decision of the committee on arbitration.

It is said in behalf of plaintiff that the injury for which he seeks compensation, the loss of an eye, was of such gradual development that knowledge of it ought not to be imputed to him nor its occurrence timed against him until he learned the fact by consulting a physician in March, 1915. But according to his own testimony he knew from the time he left the office of defendant's physician, shortly after the accident, with his injured eye bandaged and did not return, that it had not recovered from the accidental injury in reference to which he had gone to the shop doctor, and yet he did not thereafter apply for the treatment to which he knew he was entitled nor notify defendant of any trouble with his eye. He removed the bandage himself and continued to work as usual until he was laid off with the rest in October, less than three months after the accident, and he states that his eye bothered him right along during all that time, hurt when he perspired and occasionally became inflamed, that after the company's doctor got through

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with it he could only see "like through a mist" and he did no work after he quit defendant's employ "because of the eye. I was afraid it might spoil my eyes."

The statute which plaintiff invokes fixes the time and manner in which he must proceed to establish his right to an award. After a committee on arbitration had passed upon his claim for compensation and filed its decision with the industrial accident board, it was final and stood as the decision of the board unless within the seven days thereafter given by the act he, considering himself aggrieved, filed a claim for review; except, that under the proviso it was permissible, upon a legal showing that the delay was without fault imputable to him or his attorney and excused by circumstances beyond his control, for the board to extend the time in which to file such claim. In the absence of such showing justifying the delay the board had no arbitrary power to act in the matter and the seven days' limit fixed by the statute is conclusive. The showing must be such as to present some legal basis recognized as authorizing the exercise of a judicial, or *quasi* judicial, function or judgment, in administration of the law. The only claimed excuse here is temporary lack of money to pay the expenses of the desired review. Plaintiff had counsel in the matter who advised him of his right to review. Inability to furnish the funds which counsel may advise a litigant is necessary for an appeal is not recognized as a legal excuse for failure to take the proper steps for that purpose within the time prescribed by law; and if it were, plaintiff notified his counsel within the prescribed time, on October 20th, that he "will succeed in raising the necessary amount," and a week later his attorney sent for some blanks and the following month made application for extension of time. In administration of the law this is not a recognized legal "good

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cause shown" for extending the time limit fixed by statute for taking steps to review a decision on appeal.

These facts stand undisputed, as testified to by plaintiff or admitted. The accident upon which he bases his claim occurred July 29, 1914; it resulted in an immediate injury of his eye, to a degree which led him to temporarily suspend work and consult the shop doctor who dressed it and told him to go to the company's physician for treatment; his vision was thereafter impaired and his eye continued to bother him, becoming at times painful and inflamed, until he quit defendant's employ in October, 1914, and thereafter it was in such condition that he was not able to work or refrained from so doing because of fear of losing his vision. Yet he gave no notice to defendant of that which he says he knew as to the developing results of his accidental injury while in its employ and made no claim for compensation until June 9, 1915.

The six months' limitation of time fixed by this act for claiming compensation under it is plainly expressed with no qualification and no latitude given, by proviso or otherwise, to the board administering it for extension of time. Upon that proposition the undisputed facts of this case bring it squarely within the recent decision of this court in *Cooke* v. *Furnace Co., ante,* 192, wherein the subject is fully discussed by Justice FELLOWS with review of authorities.

For the foregoing reasons the order of award made by the industrial accident board herein is reversed.

OSTRANDER, C. J., and BIRD, MOORE, FELLOWS, STONE, and KUHN, JJ., concurred. BROOKE, J., did not sit.

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DANE *v.* MICHIGAN UNITED TRACTION CO.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—NOTICE—LIMITATION OF ACTION.

The limitation provided in section 15, part 2, of the workmen's compensation act (section 5445, 2 Comp. Laws 1915), begins to run from the date of the accident, and not from the time the injured employee discovers the extent of his injuries. *Cooke* v. *Furnace Co., ante,* 192.

Certiorari to Industrial Accident Board. Submitted January 25, 1918. (Docket No. 64.) Decided March 28, 1918.

Joseph Dane presented his claim for compensation against the Michigan United Traction Company for injuries received in defendant's employ. From an order awarding compensation, defendant brings certiorari. Reversed and award set aside.

Sanford W. Ladd (*Russell A. McNair* and *Warren, Cady, Ladd & Hill,* of counsel), for appellant.

Albert E. Meder, for appellee.

BIRD, J. In October, 1913, plaintiff was employed as a section hand on defendant's interurban railway. On the 15th of that month, while assisting in unloading steel rails at Albion, one of them skidded and struck his left knee and injured it. Following this he worked intermittently for the company until May 4, 1914, when he received a second injury to the same knee, while working at Parma. From this time on the knee was more or less painful and later grew worse and finally resulted in amputation on February 6, 1916. An award was applied for and allowed by the industrial accident board. The principal defense raised,

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and one which must dispose of the case, is that the claim for compensation was not made and filed within the time prescribed by the compensation law, it appearing that no claim was filed for either injury until May 15, 1916.

Section 15 of part 2 of the law (Act No. 10, Extra Session 1912, 2 Comp. Laws 1915, § 5445), provides that:

"No proceedings for compensation for an injury under this act shall be maintained, unless a notice of the injury shall be given to the employer three months after the happening thereof, and unless the claim for compensation with respect of such injury shall have been made within six months after the occurrence of the same; or, in case of the death of the employee, or in the event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity."

It is quite evident in enacting this section the legislature had in mind the desirability of fixing some limit to the time when a claim could be presented and passed upon by the commission. The language employed to effectuate this purpose, when read in connection with the context, is unambiguous and easily understood. It means, if it means anything, that the time shall begin to run from the day the accident happens and the injury is incurred. To say that the time does not begin to run until the claimant is fully advised as to the extent of his injuries, as is urged, is to import something into the section which is not there. The words *"After the occurrence of the same"* meant the same and are substituted for the words *"after the happening thereof,"* occurring in the preceding sentence with reference to giving notice of the injury. If one means the day the injury occurred the other does. It would hardly be contended that the three-month provision for giving notice of the injury did not commence to run until some time in the future when the

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injured party discovered the extent of his injuries. The language employed is not susceptible of such a construction, neither is it a reasonable one, if we keep in mind what the legislature was attempting to accomplish by inserting this particular section. The construction which the section should receive is that the time commences to run from the day the accident causes the injury. This construction is in keeping with the evident intent of the legislature to create a statute of limitations, and thereby fix a time when employers could feel certain that their liability in any particular case had ended. This construction is also in accord with the cases handed down herewith. *Cooke* v. *Furnace Co., ante,* 192; *Kalucki* v. *Foundry Co., ante,* 604.

The claim in question not having been made and filed within six months from the date of either injury, the award must be reversed and set aside.

OSTRANDER, C. J., and MOORE, STEERE, BROOKE, FELLOWS, and STONE, JJ., concurred. KUHN, J., did not sit.

SCHILD *v.* PERE MARQUETTE RAILROAD CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—LIMITATION OF ACTION—EFFECT OF LIMITATION—CONDITION PRECEDENT.

   The provision of section 15, part 2, of the workmen's compensation act (section 5445, 2 Comp. Laws 1915), providing that "no proceedings for compensation for an injury under this act shall be maintained * * * unless claim for compensation * * * shall have been made within

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six months after the occurrence of the same," is a limitation affecting not only the remedy but the right of an injured employee; the condition of giving notice of a claim for compensation, controlling the right to demand the same. *Podkastelnea* v. *Railroad Co.*, 198 Mich. 321.

2. SAME—PERSONAL INJURIES—STATUTORY NOTICE—RIGHT TO RECOVER.

In case of doubt as to whether an injured employee's right to recover falls within the Federal employers' liability act or the Michigan workmen's compensation act, in order to preserve the right to recover under the latter act the statutory notice must be given.

3. SAME—WORKMEN'S COMPENSATION ACT—LIMITATION OF ACTION—NOTICE.

Where an injured employee refused compensation under the workmen's compensation act, and brought suit against the employer under the Federal employers' liability law, later submitting to a nonsuit, after which claim was made under the Michigan act, but not until after the expiration of six months from the date of the accident, an award was barred by section 15, part 2, of the act (section 5445, 2 Comp. Laws 1915).

Certiorari to Industrial Accident Board. Submitted January 17, 1918. (Docket No. 110.) Decided March 27, 1918.

Frank L. Schild presented his claim for compensation against the Pere Marquette Railroad Company for injuries received in defendant's employ. From an order awarding compensation, defendant brings certiorari. Reversed, and award set aside.

Parker, Shields & Brown (*Charles E. Ward,* of counsel), for appellant.

Nichols & Shaw (*James K. Nichols,* of counsel), for appellee.

OSTRANDER, C. J. There is involved no question of fact. Claimant was employed by the plaintiff in certiorari and on March 23, 1916, received the injury for

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which he asks and has been allowed compensation. Plaintiff in certiorari reported the accident to the industrial accident board. In time the board made inquiry of the claimant and was informed that he refused to accept the "provisions of the compensation law and anticipates securing the services of an attorney to file suit against this company."

Again, later, the board addressed another inquiry to claimant, whose attorneys replied that—

"We have advised him that his claim comes under the Federal act in relation to employees engaged in interstate commerce and we have notified the Pere Marquette receivers of this fact but have had no reply. It is not his contention [intention] at the present time to make any claim for compensation under the Michigan act."

No such claim was made until March 3, 1917, nearly a year after the injury was received. Meantime, claimant began his suit in the Federal court, issue was joined and a trial thereof was begun. In the course of the trial, the Federal judge called the attention of counsel to the decision in *Minneapolis, etc., R. Co.* v. *Winters*, 242 U. S. 353, decided by the Federal Supreme Court January 8, 1917. Plaintiff thereupon, on January 22, 1917, submitted to a nonsuit, with leave to move to set it aside, and later, satisfied there could be no recovery under the Federal act, the nonsuit became absolute. On April 1, 1916, and again on April 11, 1916, compensation was offered claimant under the Michigan act and was refused.

The board having allowed him compensation in an order made April 12, 1917, the question presented for decision is whether the claim for compensation should have been made within six months after the injury and, not having so been made, the right to compensation is lost.

The language of the act answers the question. It is provided that—

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"No proceedings for compensation for an injury under this act shall be maintained, * * * unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same." 2 Comp. Laws 1915, § 5445.

This provision the board construed and treated as if it read:

"No proceedings for compensation for an injury under this act shall be maintained unless the claim for recompense with respect to such injury shall have been made within six months after the occurrence of the same."

Saying, further:

"In a broad sense the application made claim. In the narrow sense of the act he did not. We prefer to hold that he made all the claim he was required to make until the Supreme Court shall decide otherwise. We also think that under the circumstances of this case, the conduct of the respondent was such as to waive the making of a claim by the applicant. The applicant could not file any formal claim within the six months without endangering what he considered his right to recover under the Federal employers' liability law. Section 1, of part 6, of the workmen's compensation law (2 comp. Laws 1915, § 5488), provides:

"'If the employee, or his dependents, in case of his death, of any employer subject to the provisions of this act files any claim with, or accepts any payment from such employer, or any insurance company carrying such risk, or from the commissioner of insurance on account of personal injury, or makes any agreement, or submits any question to arbitration under this act, such action shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury.'

"As long as the applicant thought he was entitled to recover under the Federal employers' liability act, he could not safely accept any money under the workmen's compensation law, nor could he file any notice of claim with the industrial accident board. If he did so his action would have constituted a release to the employer of all claims he thought he had under the Federal employers' liability act.

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"Section 6, of part 3, of the workmen's compensation law (2 Comp. Laws 1915, § 5459), reads as follows:

"'If the employer, or the insurance company carrying such risk, or commissioner of insurance, as the case may be, and the employee fail to reach an agreement in regard to compensation under this act, either party may notify the industrial accident board, who shall thereupon call for the formation of a committee of arbitration. The committee of arbitration shall consist of three members, one of whom shall be a member of the industrial accident board, and shall act as chairman. The other two members shall be named respectively by the two parties.'

"Under that section, the respondent employer might have called for the formation of a committee of arbitration. It could have notified the industrial accident board that it owed the applicant; it could have demanded arbitration. It did fail to reach an agreement in regard to compensation with the applicant. If it had applied for arbitration in the matter the presumption would legally follow that the industrial accident board would have held that the employee was not an interstate commerce employee and would have made an award along the lines contended for by the respondent."

We consider, and have in substance held, that the statute provision referred to is a limitation affecting not only the remedy but the right of an injured employee. *Podkastelnea* v. *Railroad Co.*, 198 Mich. 321. The judicial power does not extend to setting aside the plain terms of the law. The proceeding is special. The condition of giving notice of a claim for compensation, controlling the right to demand the same, is clear. There is no room for construction, and the difficulties attending upon a judicial variance from the legislative rule are obvious. Perhaps the legislative rule ought to be changed: a question for the legislature. But I can see no difficulty in such a case if the right to compensation under the Michigan law is preserved by notice, although the right way be doubtful. If the case falls within the Federal statute, remedy under

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that statute is exclusive; if within the Michigan law, the Federal law has no application. But if a right under the Michigan law is claimed, notice of the claim must be given within six months after the injury is received.

The order awarding compensation is set aside, with costs to plaintiff in certiorari.

BIRD, MOORE, STEERE, BROOKE, STONE, and KUHN, JJ., concurred with OSTRANDER, C. J.

FELLOWS, J. I think this case is ruled by *Cooke* v. *Furnace Co., ante,* 192; *Kalucki* v. *Foundry Co., ante,* 604; and *Dane* v. *Traction Co., ante,* 612. For the reason stated in these cases I concur in the reversal of this case.

DREIJER *v.* DREIJER.

DIVORCE — SEPARATE MAINTENANCE — ABSOLUTE DIVORCE — DISCRETION OF COURT.

Where a wife filed a bill asking for separate maintenance, defendant filing an answer in the nature of a cross-bill asking for a decree of divorce, and a decree was entered providing for separate maintenance and ordering defendant to pay plaintiff $5 a week; and about a year later defendant moved to modify the decree by granting an absolute divorce and reducing the amount of alimony, in view of the record before this court, settled by agreement, showing that defendant admits his adulterous conduct charged in the original bill, and that he is in default in the payment of alimony, neither the best interests of the parties nor any consideration of public policy requiring the

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exercise by the court of its discretion to grant an absolute decree, and, the amount of alimony being reasonable, the order of the court below denying the motion will be affirmed.

Appeal from Kent; Gilday, J., presiding. Submitted January 15, 1918. (Docket No. 77.) Decided March 27, 1918.

Bill by Susie Dreijer against George Dreijer for separate maintenance and alimony. Defendant filed a cross-bill asking for a divorce. A decree was entered for plaintiff and the defendant's cross-bill dismissed. From an order denying defendant's motion to amend, defendant appeals. Affirmed.

Ellis & Ellis, for plaintiff.

H. Monroe Dunham (*Arthur R. Sherk*, of counsel), for defendant.

OSTRANDER, C. J. Plaintiff is 44, and defendant 47, years of age. They were married in November, 1890, have had five children, four of them—three girls and one boy—living and married. In August or September, 1915, plaintiff filed her bill against defendant asking a decree for separate maintenance and for general relief. In the bill she charges defendant with sexual commerce with other women and shameful conduct. He answered the bill and in his answer asked for affirmative relief, namely, for a decree of divorce. He denied the charges made by his wife and accused her of listening, willingly, to gossip about himself, making unfounded reports the basis of her charges, and unwifely behavior. She answered his cross-bill.

The cause was heard upon pleadings and proofs and a decree made, February 3, 1916, divorcing the parties from bed and board and providing for the separate maintenance of plaintiff by defendant, who is ordered

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to pay her the sum of $260 a year, beginning January 26, 1916, in weekly payments of $5 each. Plaintiff is also given possession and use of all household furniture. Costs and a solicitor's fee of $50, defendant is also ordered to pay.

About a year after the decree was made, the defendant moved the court to modify and amend it so as to grant an absolute divorce and so as to reduce the amount of alimony. There was an answer to the petition and various affidavits appear to have been presented to the court. The prayer of the petitioner was denied by an order dated April 24, 1917. When this order was entered does not appear beyond this, that the notice of appeal therefrom describes it as entered May 9, 1917. The record before us was settled by agreement—at least appellee did not oppose and did approve it—and the certificate made thereto by the circuit judge reads:

"The foregoing are all the pleadings in said cause and the affidavits, petitions, exceptions and orders made therein, and it being herein admitted that the material allegations in the bill of complaint and the answer to the cross bill contained are true, and that the said defendant is guilty of the extreme cruelty and misconduct therein charged, and that the material allegations made in the answer and cross bill of the defendant are not true, and that the petition to amend the final decree was heard on answer and affidavits in open court, and denied as herein set forth, therefore, on this 17th day of July, A. D. 1917, said proceedings above set forth, showing the pleadings, decree, petitions, affidavits and other papers on file and of record in said cause and the facts, being the entire case outside of the evidence taken in court therein, are settled and signed as a case-made and settled, pursuant to the statute and within the time prescribed by law."

We have before us none of the testimony given at the hearing of the divorce suit, but have, as is above indicated, the admission of defendant that the charges

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made by his wife are true and his counter charges unfounded.

What appellant desires is a decree for divorce and it being admitted that the bill was not filed pursuant to 3 Comp. Laws, §§ 8686, 8687 (3 Comp. Laws 1915, §§ 11479, 11480), he invokes the rule that the discretion of the court may be exercised, in such a case, to grant an absolute divorce against plaintiff's protest, if it seems to be for the best interests of the parties to do so. *Burlage* v. *Burlage*, 65 Mich. 624; *Horning* v. *Horning*, 162 Mich. 130. See, also, *Utley* v. *Utley*, 155 Mich. 258; *Coon* v. *Coon*, 163 Mich. 644; *Lacey* v. *Lacey*, 189 Mich. 271; *Cole* v. *Cole*, 193 Mich. 655. We said in *Burlage* v. *Burlage*, *supra*, that the authority, where a case is made out for a permanent separation, to grant an absolute divorce, if it appears proper to do so, was not exercised

"To meet the desire of the parties, but on grounds of public policy, to prevent the mischiefs arising from turning out into the world, in enforced celibacy, persons who are neither married or unmarried."

The discretion of the court in these, as in other, cases will be moved as the facts seem to demand. Defendant is not charged with personal abuse of the plaintiff or with failure to support her. He is charged with having committed adultery and with parading his adulterous conduct and his paramour to the shame of his wife and children. He admits the charges. Before this suit was begun, another suit was instituted, for a like reason, but it would appear the evidence to sustain the charges was not available, or it was by her assumed that it was not. In any event, upon defendant's denials she discontinued the suit and marital relations were resumed, to be again broken off when defendant's conduct forced her to take some action.

Defendant says his earnings are insufficient to support himself and pay the stipulated alimony. He is now in default in this behalf. It does not appear that

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his financial condition will be improved by his remarriage. He was, when the decree was granted, a traveling salesman, earning, he says, about $65 a month. He now earns, he says, $14 a week. I am impressed that the provision for alimony is reasonable and that the order appealed from should stand. In view of all disclosed circumstances, public policy will be fairly served if defendant is permitted to continue the modest payments in aid of the support of his wife which the decree below provides for.

Order affirmed.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

NORTHRUP *v.* NORTHRUP.

DIVORCE—EXTREME CRUELTY—EVIDENCE—SUFFICIENCY.

On appeal from a decree dismissing the husband's bill for divorce, evidence on the part of plaintiff that defendant's constant nagging, scolding, and fault-finding rendered it impossible for them to live together, although plaintiff was not entirely without fault, *held*, sufficient to make out a case of extreme cruelty requiring reversal of the decree of the court below and one entered granting divorce.

Appeal from Wayne; North, J., presiding. Submitted January 10 1918. (Docket No. 44.) Decided March 27, 1918.

Bill by LeRoy Northrup against Cora May Northrup for a divorce. From a decree dismissing the bill,

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plaintiff appeals. Reversed, and decree entered for plaintiff.

Welsh, De Foe & Kahn, for plaintiff.

James J. Noon, for defendant.

OSTRANDER, C. J. This cause was heard in April, 1916. At that time the plaintiff was 36 years of age. The parties were married in 1904, and lived together until 1914. In the ten years of cohabitation there have been three children born, but one of whom, the first born, a hopelessly deformed and physically deficient, but mentally bright, daughter, a great care, is living. The plaintiff charges his wife with extreme cruelty. Acts of physical violence are charged and the testimony for plaintiff, particularly his own testimony, tends to prove that the defendant, upon occasions, employed her hands and feet upon him in inflicting personal injury, and her tongue in vilifying and abasing him and his father. On the other hand, defendant, who denies the charges of cruelty, and who seeks no relief from the marriage contract, claims that she has been obliged to defend herself, by force, from threats and from attempts of plaintiff to strike her—to slap her. An analysis of the testimony shows that whatever either party did personally, to the other, was as a rule the result of disagreements, the climax of wordy disputes. Both are reputable; the plaintiff a hard-working man, of good habits, home-loving, economical, the defendant a good housekeeper, clean and capable in a housewifely way. They had a good home, well furnished, convenient. Help, when it was needed, defendant always had. From a material standpoint, they should have prospered, as they did for a time, should have accumulated a competence, and in the course of time have been able to dismiss anxiety for the future. Their trouble, primarily, seems to be one

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of mismating; secondarily, the inability of one or both of them to compromise and to adjust differences—to adapt themselves to each other. As I have said, the physical encounters were usually, if not always, the conclusion, the result, of wordy wars. Plaintiff contends that defendant's conduct, "Nagging, fault-finding, scolding, pestering the life out of me," as he puts it, with no prospect of ultimate peace, resulted finally in reducing him to a state in which he could not go on, effectively, with his business, lost his ambition, and seriously affected his health. He claims to have been fairly driven from his home by her, unable there to escape her petulant persecution, day or night. He left home once, in the night, going to a hotel for rest. He left home, finally, taking a journey of some length and a rest of some duration. Judgments were taken against him and property he owned was sold to satisfy creditors, or those he claims were creditors. He is blamed for this by counsel for defendant. That he might have avoided this, might have gone on accumulating, paid his debts, saved his property, I have no doubt, if his courage and ambition had continued.

Some excerpts from defendant's testimony throw light upon the situation:

"*Q.* Now, on the occasion this tea-cup was thrown, you said Mr. Northrup came around the table to slap you, he was going to, but he didn't?

"*A.* He did.

"*Q.* He did slap you that time?

"*A.* Yes, he did.

"*Q.* And did he slap you with his open hand?

"*A.* Yes, sir.

"*Q.* Where did it strike you?

"*A.* Well, on the face, I don't remember particularly.

"*Q.* On which side?

"*A.* I don't remember.

"*Q.* Did he leave any marks?

"*A.* No.

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"Q. Did you throw the cup afterwards or before he started?

"A. As I think it over, he went back and sat down at his place and I picked up the cup, and as I picked it up the tea went back on the wall; I threw the cup and it broke on the radiator.

"Q. The cup broke back of where you were sitting?

"A. Yes, sir.

"Q. So the cup struck over his chair and not over yours?

"A. I don't know whether it struck the chair or not.

"Q. Over the chair, on the wall back of the chair?

"A. It didn't strike on the wall, it struck the radiator; there is no wall; the window is over the radiator.

"Q. Where was the radiator, back of Mr. Northrup's chair?

"A. Yes, sir.

"Q. You threw the cup after he slapped you?

"A. Yes, sir.

"Q. What led up to that, do you recall?

"A. I don't remember.

"Q. He had gone back and sat down?

"A. Yes, sir.

"Q. And some time elapsed before you threw the cup at him?

"A. No, as soon as he sat down I picked up the tea and threw it at him.

"Q. Now, at the time of this accident when you cut your arm, he was going to strike you on that occasion?

"A. Yes, sir.

"Q. He didn't strike you?

"A. No, he didn't. * * *

"Q. Now, you said when you lived with Mr. Northrup's parents he slapped you at other times with his open hand?

"A. Yes, sir.

"Q. Can you recall any specific occasion?

"A. No, I can't.

"Q. How were those blows, did he push you with his open hand or leave his hand flat?

"A. No, he walked right up to me and slapped me.

"Q. Without any provocation?

"A. Well, I presume we were probably having words.

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"Q. Well, did he strike you hard?
"A. Yes, he struck me hard.
"Q. Leave any marks?
"A. No.
"Q. Did you speak to him about it at the time?
"A. No, I didn't.
"Q. Was any one ever present when he struck you?
"A. No one but the children.
"Q. Who was present?
"A. A small cousin of Roy's once.
"Q. Who was that?
"A. Madeline Thomas.
"Q. When was that?
"A. Oh, I couldn't tell you when it was; it was perhaps a year before Roy went away.
"Q. Well, did you speak to any one about that?
"A. No, I didn't.
"Q. Well, now, do you remember any other occasion?
"A. Not anything in particular; he slapped me a number of times.
"Q. Do you recall an occasion where he took hold of your hands and arms and held you on the floor during one of these times when you were having words?
"A. No, I do not.
"Q. Well, did he ever do that?
"A. Not that I remember.
"Q. He never held your arms?
"A. He has taken hold of my arms and taken hold of my wrists hard; he would be angry. I never went to Mr. Northrup; he came to me.
"Q. He took hold of your hands on several occasions and held them tightly?
"A. Yes, he did.
"Q. Why did he do that?
"A. Because he was angry.
"Q. Is that all?
"A. Why, yes; he was angry.
"Q. Were you angry, too?
"A. I perhaps wasn't very good-natured, any more than he.
"Q. And you have taken him by the ears on one occasion?
"A. Yes, sir; the day he went away.
"Q. And that was in the morning before he was dressed?

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"*A.* Yes, sir.
"*Q.* While he was dressing?
"*A.* Yes, sir.
"*Q.* And you had bitten him on the arm once?
"*A.* I think I bit him; it was because perhaps he was abusing me.
"*Q.* But you have bitten him on the arm?
"*A.* But not enough to hurt him.
"*Q.* But you bit him?
"*A.* I attempted to in self-defense.
"*Q.* And another time you attempted to strike him with a fork?
"*A.* In self-defense.
"*Q.* He had noticed that you would strike him or bite him or something like that?
"*A.* I never offered to.
"*Q.* But he knew you had done these things, and isn't it a fact he took hold of your arm and hands to stop you from doing any damage?
"*A.* No; he would take hold of my arms and hands and he would pinch very hard.
"*Q.* On those occasions would he strike you?
"*A.* It is likely he would strike me.
"*Q.* Isn't it likely you would keep those things in mind?
"*A.* No, I tried to forget those things.
"*Q.* Can't you fix the time, Mrs. Northrup, when any of these occasions happened—they must stand out in your mind with a certain amount of distinction?
"*A.* Well, I can't tell you any certain instance, but I remember every time and very often when I would approach Roy to ask him about affairs, which I thought I had a right to understand and know, he would say 'what difference does it make?' and I would say, 'I think I have a right to know.'
"*Q.* What were those things?
"*A.* Property affairs and about his business that I really should know, and he says, 'Well, all you want to do is quarrel, you just want to pick a quarrel,' and I would say, 'Roy, you know better, that is only right, you know I should know it,' and he would spring at me and he ran clear out of his office and slapped me in the face if I would insist on knowing.
"*Q.* If you would insist on knowing?

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"*A.* Yes, sir.

"*Q.* You became very firm in your manner of insisting?

"*A.* After I had been refused and refused.

"*Q.* How would you insist on knowing these things —what did you say to him?

"*A.* I would say, 'Roy, won't you please tell me about things' I wanted to know about, about what he took in when they were in business, and all he wanted me to know was the $10 or $15 he handed to me in an envelope, and when I would want to know he would say, 'You want to quarrel, but it isn't any of your business,' and I would say, 'No, I don't want to quarrel, Roy,' and he would say, 'Oh, yes, you do, you just want to quarrel,' and so I would drop it; I would think, I will wait, and at another time I will approach him again kindly, and I would ask him; he would again tell me I wanted a quarrel and I would drop it.

"*Q.* When would you insist on having this information?

"*A.* When I continued to keep asking him, I would ask him at night, and these are the occasions when he speaks of my renewing the same.

"*Q.* These are the occasions that continued over a long course of time?

"*A.* Yes, because he wouldn't give me any satisfaction whatever.

"*Q.* And those are the times when he would become angry and strike you?

"*A.* Yes, sir.

"*Q.* Well, you can't remember any definite one?

"*A.* No, not any definite one; every time I would ask him.

"*Q.* When he would come to you and hold your hand, would he stand close to you or at arm's length?

"*A.* He would come and grab hold of my wrists, shake me.

"*Q.* Would he stand off at a distance or close to you?

"*A.* Well, naturally as any one would stand under the circumstances.

"*Q.* Did he stand close to you or at arm's length?

"*A.* Well, I couldn't tell you exactly, like that.

"*Q.* You kicked him on occasions?

"*A.* When he was abusing me; yes.

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"Q. You kicked him in the shins?

"A. Yes, sir.

"Q. And you also kicked him in the abdomen?

"A. Well, I don't know.

"Q. Well, you tried to?

"A. Because he was abusing me, I tried to in self-defense, as I told you before; I never approached Roy only in self-defense; I never offered to touch him only as he came at me.

"Q. You tried to kick him in a part of the body which, if you were successful, would cause him great pain and suffering?

"A. Why, I kicked him any place it happened, so long as he was abusing me, in self-defense.

"Q. So when he took you by the wrists he would hold you out at arms length?

"A. I don't remember. He might have. * * *

"Q. So the only complaint you could have had was because he didn't tell you about the property, isn't that so?

"A. Well, I didn't like him to slap me all the time.

"Q. Well, you never spoke to anybody about it?

"A. I considered it serious enough to keep it to myself.

"Q. But that isn't so serious in your mind as the fact he didn't let you know about his business?

"A. I considered that was quite serious.

"Q. Not so serious as the curiosity about his property, in other words you were speaking to him more about the property than you were about him slapping you?

"A. Yes, because I didn't care to keep that in mind, about the slapping.

"Q. The more important part was about the property and not the fact he slapped you, isn't that so?

"A. I don't know that I made any complaint.

"Q. Well, I mean in your own mind, your attitude would be governed when you tried to determine the relative importance of these matters, you think his secrecy about his property was most that caused you more pain and suffering than the matter of striking you?

"A. I thought enough of Roy that I felt I would like to have him treat me as a companion and I felt that he would consider that I should be interested.

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"Q. So I say the important thing in your mind was the secrecy he maintained, that is the most important thing?
"A. Yes.
"Q. And not of striking you, that was incidental?
"A. Well, I considered that was quite serious; I wouldn't care to have it happen any more."

At the hearing, two years after separation, it appeared that defendant had meantime occupied the home and had received her support from plaintiff. She testified:

"Q. How did you feel when Roy left, were you disconcerted and unhappy?
"A. I felt very badly.
"Q. Were you unhappy?
"A. Yes, indeed.
"Q. Did you tell any one you were dissatisfied or unhappy, you hoped he would come back?
"A. Yes, a good many times.
"Q. Who did you tell?
"A. I have told Mrs. Jones and I have told my sister Mrs. Degner right here. I have said if Roy wants to stay away and he supports us, all right I will make the best of it; I can get along all right. I have never said I didn't want him, I said if he really prefers to be away from me it is all right, if he just gives me the money.
"Q. And you would be perfectly satisfied?
"A. I am not perfectly satisfied, no indeed.
"Q. Well, you haven't been perfectly satisfied during your marriage relations any time?
"A. Why yes I have if Roy had been kind to me I would have been."

The testimony of other witnesses, if true, shows her present attitude to be one of satisfaction so long as she is supported by her husband. That she visited her husband's place of business and there publicly entered upon wordy controversies with him is established.

Plaintiff testified that he never had slapped defendant, although he admits having threatened to do so.

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The weight of evidence is, I think, the other way and requires the finding that he has in moments of exasperation slapped her face. That defendant feared him is not true. Her attack upon him while he was dressing upon the morning when he finally left home, when she took him by the ears and shook his head, is evidence of this.

The testimony tends to prove, and requires the finding, that defendant used in talking to her husband language not generally regarded as proper for either man or woman to use, in speaking of plaintiff's father.

A witness for defendant, her brother, whose testimony impresses me as that of an observing man, gave the following testimony:

"*Q.* Now, as a matter of fact, Mr. Melling, Mr. Northrup came to you at various times and told you Mrs. Northrup and he were having troubles and she was nagging him, he counseled with you in regard to what to do?

"*A.* He told me at various times they were having trouble and she was nagging at him and would keep at him and jaw at him and he couldn't go to sleep.

"*Q.* And put it up to you what he could do, how he could get over it?

"*A.* No, I can't say he did. I did go to Mrs. Northrup and talk to her about these things, about their troubles, and try to have her stop it, and told her they should not occur any more. I told Roy the same thing, but he didn't ask me for it. As near as I can recall, the occasion I told her I was sorry they couldn't get along a little better, that I had talked to Roy and I wanted to have a little talk with her and see if there wasn't some way they could get together, compromise and live together without quarreling and scrapping all the time.

"*Q.* It was your desire, as well as Roy Northrup's desire, to get along without scrapping?

"*A.* That was my desire.

"*Q.* Didn't Mr. Northrup tell you he didn't like to live that way; he didn't like to have quarreling in his house?

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"*A.* He did tell me he didn't like it.

"*Q.* He didn't enjoy this life he was living?

"*A.* I don't see how he could.

"*Q.* As a matter of fact, wasn't he down-hearted and down-spirited all the time and dejected over the quarrels he was having?

"*A.* Apparently so.

"*Q.* Very much troubled and nervous, he couldn't stand it; it bothered him in his work and his book-keeping and work at his office?

"*A.* I don't know to what extreme it affected him.

"*Q.* Wasn't he—wasn't it noticeable when he was having these troubles; he was nervous, very moody and quiet?

"*A.* He was.

"*Q.* Brooding over them apparently?

"*A.* I would say so.

"*Q.* Now, when you went to Mrs. Northrup and told her about these things, did you tell her to cut out the nagging, to get along without it and live without these quarrels?

"*A.* No, I told her—as a matter of fact, I told her as I had sized the situation up, from what I had seen and heard, that one was to blame as much as the other, and if each one of them did their part I thought they could live together just the same as any other family was living.

"It seemed to me that they were both in trouble, and each one would have to do their end if they ever came together. The way I expressed it to her was that she must come half way and he should come the other half; that there were no two persons alike, and they would have to both compromise; perhaps there were things he did that she didn't like and there were things that she did that he didn't like, but they would have each to overlook a certain amount of it and try to get together.

"*Q.* Do you know, Mr. Melling, as a matter of fact, do you know what the disputes were over, how they arose or what they were over?

"*A.* Well, I don't know very much about that, but it always occurred to me that a great deal of it was on account of Roy working so much.

"*Q.* He was working too long hours to be really a home man?

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"*A.* That is the idea exactly. He was home, but he was confined to his office, and the way it always occurred to me, that he was too busy ever to sit down and visit or take a walk and go and visit somebody else; he was confined right there, and he just came home and got his meals and did his work and went to bed.

"*Q.* In other words, he wasn't a social enough being?

"*A.* No, he didn't spend enough time with his family, in my opinion.

"*Q.* He was a worker?

"*A.* Absolutely.

"*Q.* Well, now, coming back again, you have heard these little disputes—little words, as you call them?

"*A.* Very few of them.

"*Q.* When you heard them what do you find they were quarreling about, having words over, what was the real foundation of them?

"*A.* As a matter of fact, I don't think there was very much foundation to any of them.

"It looked to me as though they were disagreeable. It looked to me as though neither one of them had to do or say very much to start something. Mrs. Northrup is a woman who can sit down and argue a subject without getting angry, but I don't know whether she can with Roy, I couldn't say.

"*Q.* You don't know, Mr. Melling, at any time, of your own knowledge, of any time that Roy Northrup ever abused or mistreated Mrs. Northrup, of your own knowledge?

"*A.* I never saw anything of the kind?"

This witness knew little of the home life of the parties from observing it, and the advice he gave would undoubtedly be valuable in most cases of domestic infelicity. I am impressed, however, that here the situation is a more serious one. The nature of a man's domestic troubles, or of a woman's domestic troubles, may be evidenced by its effects. Men like the plaintiff do not work hard for ten years or more to get and maintain a home and acquire a competence and then sacrifice home, family and business as plaintiff has done for a whim or out of spite or revenge merely.

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There is a driving, compelling cause for such action. And when the cause is, admittedly, domestic trouble, the action is evidence of desperation, lost hope, insupportable conditions.

I should have been more sure of my conclusions if I had seen the parties, and other witnesses, as the trial judge did. Upon this record, I am compelled to disagree with his conclusion and to hold that plaintiff has made out a case of extreme cruelty practiced by defendant. It may be true, as the court below found, that the burden incident to caring for the child has done much to make defendant irritable. It does not excuse the conduct of defendant who has, I believe, no affection for plaintiff and no purpose to assist in rebuilding and carrying on, if it were possible, a pleasant or peaceful home. It is not possible, I think, for them to live together.

The decree must be reversed and one entered divorcing the parties. The custody of the child should be given the mother, presently at any rate. The record does not permit us to fix the alimony, if any ought to be allowed. The defendant is at liberty to apply to the court below for permanent and temporary alimony.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

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PEOPLE *v.* DAY.

INDICTMENT AND INFORMATION—EMBEZZLEMENT—VARIANCE—EVIDENCE.

An information under section 15315, 3 Comp. Laws 1915, charging that defendant embezzled money belonging to another, the vendee in a land contract, was not supported by evidence showing that said money was received by defendant as the executor of the estate of the vendor, deceased, in said contract, although at the time the information was drawn the contract had been set aside by the court and a decree entered for the repayment of the money by the estate.

Exceptions before judgment from the recorder's court of Detroit; Connolly, J. Submitted January 17, 1918. (Docket No. 192.) Decided March 27, 1918.

Ebenezer Day was convicted of embezzlement. Reversed and respondent discharged.

John Galloway and *Henry M. Du Bois*, for appellant.

Charles H. Jasnowski, Prosecuting Attorney, and *Robert T. Speed*, Assistant Prosecuting Attorney, for the people.

OSTRANDER, C. J. The information alleges that respondent did receive and come into the possession of $520, lawful money, of the personal property, goods and chattels of Edwin Becker, and afterwards, and while the said goods and chattels were in his possession, he feloniously and fraudulently embezzled and converted the same to his own use, and thereby he the said property did feloniously steal, take and carry away. There is also a count charging larceny of goods and chattels of the value of $520. The information was filed July 5, 1916. Respondent was convicted by

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the verdict of a jury and reviews the proceeding upon exceptions before sentence.

There is no "statement of facts" in the brief for respondent, although various facts are stated, but it is said that the respondent is in the same situation here as he was in a former case reviewed by this court and reported 185 Mich. 68; that there is involved the same subject-matter and the same testimony. The brief in no respect complies with the rule of this court.

The brief for the people contains the statement:

"The case was before this court at the March term, 1915, and is reported in 185 Michigan, page 68. By reference to that case it will be seen that respondent was convicted of the charge of embezzlement, growing out of the same state of facts appearing in the record now before the court. It was there held that the respondent, who was acting in the capacity of an executor, should not have been charged under section 11591, of the Compiled Laws of 1897 (3 Comp. Laws 1915, § 15336), which relates to the conversion by agents and clerks of moneys entrusted to them, it being intimated that if any offense was committed, it should have been prosecuted under section 11610 (3 Comp. Laws 1915, § 15375), relating to embezzlement by executors and administrators."

A reference to *People* v. *Day*, 185 Mich. 68, discovers the fact that in that case respondent was charged with being the agent and clerk of Edwin Becker, a fact which the testimony absolutely disproved, and with receiving, while he was such clerk and agent, by virtue of his said employment, money belonging to Becker, which money he converted to his own use. The information in the case now before us is filed, it is assumed, under 3 Comp. Laws 1915, § 15315, which reads:

"If any person to whom any money, goods, or other property which may be the subject of larceny, shall have been delivered, shall embezzle or fraudulently convert to his own use, or shall secrete with the intent

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to embezzle, or fraudulently use such goods, money, or other property, or any part thereof, he shall be deemed by so doing to have committed the crime of larceny."

An examination of the record, which is made because the liberty of respondent is involved, discloses the following facts, not disputed: Alonzo F. Anscomb and his wife, Anna Anscomb, were owners of a farm and a house and lot, all of the property situated in Wayne county. (In what proportions the property was owned by each does not appear; nor what the estate of the wife in the property was.) They contracted to sell the farm to one Edwin Becker March 9, 1907, for $6,000, some, at least, of the payments being deferred and by agreement to be made from time to time. To February, 1911, when Mrs. Anscomb died, payments were made on the contract to the vendors. By her will, respondent was named the executor of her estate and qualified as executor. After her death, one payment of $540 was made to some one other than respondent, and thereafter payments were made to him. He executed receipts, signing the same as "Executor of Anna M. Anscomb estate," and he so gave a receipt for $520 paid to him April 8, 1912, "to apply on land contract on the Anscomb farm." This is the sum of money respondent is said to have stolen. Other sums paid to him on this contract were $530 and $510. The Anscombs also deeded the house and lot to Becker and of the purchase price he paid to respondent $1,570. Some time after the death of his wife, Mr. Anscomb was declared to be an incompetent, and one Boden, a brother-in-law, was appointed guardian. The guardian instituted an action to set aside these sales, and respondent was made a party defendant. Under date February 11, 1913, a decree was made in that action setting aside the sales, determining that Becker had paid $4,259.36, which ought to be repaid to him, and containing the provision that of

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this sum $3,854.90 should be paid to Becker by respondent. This was the sum, with interest, which it was found had been paid by Becker to respondent. Five days before the decree was signed, respondent filed in probate court his account as executor. In it he admitted total receipts of $4,825.91, claimed his disbursements and fees were $2,675.82, and stated the balance due the estate to be $2,150.09. On March 17, 1913, the probate court made an order in the matter of the estate of Anna M. Anscomb, deceased, which disallows most of the sums claimed to have been disbursed, which states no sum as due from the executor to the estate, and contains the provision:

"Executor is not charged with the various items of cash received upon Becker land contract, deed and bill of sale, said money not being a part of the estate of Anna M. Anscomb."

Respondent, a witness in his own behalf, upon the trial of this case, testified that he had received a total of $3,130 from Becker, that the balance he contends he ought to account for is $2,150, and that he would pay that amount to Becker when his attorney told him to do so. He testified further that he had used some of the money in his own business, and it appears that he deposited some or all of it to his own credit, and not in a special account.

I have examined respondent's exceptions. I do not find that he was prevented from presenting the facts upon which his theory depends. His contention was stated to the court in the absence of the jury, and was overruled. Whether this ruling was correct is, upon this record, the question presented for decision. The statement and motion made for him was:

"At this stage of the trial, if your honor please, the people having rested, and in consideration of the evidence therein adduced, it is clearly apparent that the money the respondent is charged with embezzling

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came to his possession and control as executor of the estate of Anna M. Anscomb, deceased. Such money being one of the instalment payments under a land contract which came into the respondent's control was part of her estate in personalty,—a contract executed by Mrs. Anscomb for the sale of her farm to Mr. Becker, the complaining witness, some four or five years before she died,—on the stipulated payments, as therein provided, till it matured, as it did, during Mr. Day's administration of her estate. The money he is charged with embezzling is $520, one of the instalments collected by Mr. Day on that contract; collected by him in his official capacity, precisely as he had collected all the others since Mrs. Anscomb's decease, including, notably the instalment of $540 of which he was also charged with embezzling under 3 Comp. Laws, § 11591, and of which charge he was held not to be guilty by the Supreme Court, because not charged under section 11610, relating to executors, administrators, and others controlling money coming into their possession in a trust capacity.

"Now in this trial the respondent is charged practically under the same section as in his former trial, the only difference being the omitting of the word agent, clerk, apprentice of the complaining witness, and the statement he was not under the age of sixteen years thus leaving the information as to its sufficiency weaker than it was in his former trial. Therefore we here move for the respondent's discharge at this time.

"Further, we here also move, under the evidence adduced at this time in the trial, clearly disclosing that the respondent obtained possession and control of the items of money here charged against him as an item in the aggregate of the entire money he was entitled to and did collect, and had in his possession in his capacity as executor, did so in every respect identically as with his collections of the preceding instalments collected on said contract, viz., the $540 as charged against him in his former trial resulting in his acquittal, entitles him to be discharged on his plea now here presented of his former jeopardy."

This may be fairly treated as presenting the point that the evidence does not support the charge made in

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the information. The statute under which the information is filed reaches the person who, while holding, having possession lawfully of, the money or goods of another, converts the property to his own use. It is evident that no money belonging to Mr. Becker was ever delivered to respondent within the meaning of the statute, and he never, being possessed of Becker's money, converted it. It was not paid to or received by respondent as Becker's money, at all, but was paid and received in discharge of a debt which Becker owed, for which payment Becker received the desired and proper credit. In the hands of respondent, the money was treated as a part of the estate of his decedent, to be accounted for by him as executor; precisely the situation contemplated when the money was paid to him. Becker not only had no title to the money he paid but he had no right to demand repayment of it and could not have enforced repayment. It was not until the court, at the instance of the other party to the contract, set aside the contract upon which the payment had been made and determined that in equity Becker ought to have his money back, with interest, that any right to demand it arose. Argument might be extended and illustrations multiplied without adding to the force of what has been said. The trial court should have directed an acquittal.

The conviction must be set aside and the respondent discharged.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

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MOORE *v.* HARNECK.

1. APPEAL AND ERROR—EVIDENCE, FAILURE TO INTRODUCE—CONDUCT OF COURT.

   Where, after the court's suggestion that defendant offer additional proofs to perfect the record was not acted upon by counsel, a verdict was directed against him, it cannot be contended in the appellate court that defendant was stopped by the court from offering additional testimony considered by him to be material.

2. TELEGRAPHS AND TELEPHONES—REPLEVIN—REBATE—NEW CONTRACT.

   In an action of replevin for a telephone which defendant had ordered out, and then refused to surrender after the termination of his contract on the theory that a rebate was due him, evidence that plaintiff told defendant to go to the bank and get his rebate, *held*, not sufficient to establish a new contract.

3. SAME—RIGHT TO POSSESSION.

   A promise to repay money to defendant would not affect plaintiff's right to possession of the telephone on the expiration of the rental contract.

4. NEW TRIAL—EVIDENCE—OMITTED TESTIMONY—TRIAL.

   A motion for a new trial because of omitted testimony was properly denied where said testimony, if received, would not have changed the result.

5. SAME—DISCRETION—ATTORNEY AND CLIENT.

   It was not an abuse of the court's discretion to deny a motion for a new trial because of counsel's unfamiliarity with the details of the testimony, he not expecting to try the case, but only to assist.

Error to Sanilac; Beach, J. Submitted January 18, 1918. (Docket No. 144.) Decided March 27, 1918.

Replevin in justice's court by William J. Moore against William Harneck for the possession of a telephone. There was judgment for plaintiff, and defendant appealed to the circuit court. Judgment for

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plaintiff on a directed verdict. Defendant brings error. Affirmed.

W. H. Burgess, for appellant.

Plaintiff, in the year 1911, was owner of a telephone system, with a central office at Marlette and a line in the highway in front of defendant's farm. Defendant was a subscriber, using a telephone installed in his home by plaintiff, belonging to plaintiff. There was a contract, expiring February 1, 1915, and defendant had paid his telephone rental to that date. The testimony tends to prove that in July, in the year 1914, with a change of system, certain persons at one time on the line—persons with whom defendant had business relations and needed often to call by telephone—were put on another line. As early as August, 1914, defendant complained to plaintiff about the said change and also about the service. Under date of August 8, 1914, he wrote to plaintiff a letter in which he says—

"I would like to have you move your telephone poles off my farm as I want to plow and level the ground where they stand. Please move at once. If you have a right to part of my farm lets see your papers. * * * Please put him" (Frank Heifner, one of the parties changed over to another line) "back on our line and fix my phone, or come and pay money back, take poles and phone off my place at once."

The details of the trouble are not very important. This excerpt from the letter of August 8th indicates, fairly, the attitude of defendant. He did not recall nor amend the order or request contained in this letter. Under date August 15, 1914, he again wrote to plaintiff, concluding his letter by saying,

"So please put the Heifner boys phone back on this line, or come and pay my money back, take poles and phone off my place at once. No need of waiting any longer as I mean what I say about the matter."

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Differences were not arranged. Defendant did not renew, or offer to renew, his subscription, and it is plain that he did not intend to do so.

Possession of the telephone having been refused February 18th, on February 24, 1915, plaintiff sued out in justice's court a writ of replevin and upon the writ an officer took the telephone and attachments. In the replevin suit pleadings were filed, there was a trial and a judgment for plaintiff. Defendant appealed to the circuit court and in that court plaintiff's testimony tended to prove, among other things, the admission by plaintiff that defendant had not had, for some period of time, proper service and the offer of plaintiff to allow defendant a rebate. Defendant's testimony tended to prove that upon one occasion plaintiff told him that he was entitled to about six months' rebate and told him to go to the bank and "get the rebate." No rebate was in fact called for at the bank or was paid, and none was otherwise tendered. It is doubtful if the testimony, all of it, can be construed as proving an open or unconditional offer to pay, or allow, a rebate; rather, it tends to prove an effort to have defendant continue to rent his telephone and that the offer was made as an inducement to him to do so.

Before plaintiff rested, the court called upon counsel for a statement of theories and counsel for defendant said:

"We claim we paid, and it is admitted we paid, up to the first day of February, 1915. We claim that we were entitled under the arrangements by which they had the telephone there and also by the statement of the plaintiff himself, to a rebate of six months—about $6.00 or a little better, and that we had not been paid that money back, and consequently we are entitled to the telephone for a further period of time or the money back. If he came and paid us the money he was entitled to his telephone, but if he didn't pay us the money we were entitled to hold the telephone and use it during that time."

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Defendant, called as a witness in his own behalf, gave some testimony. While he was upon the stand, after a colloquy between court and counsel, the court said,

"I think, Mr. Burgess, you may make an offer of such additional testimony as you think you will require to perfect your record, but I think the character of the holding was such as to preclude any recovery on his part."

The right to make further offers of testimony was again expressly given to defendant. No offer was made, and the court directed a verdict for plaintiff and there was a judgment entered on the verdict. Defendant moved for a new trial, stating as grounds therefor, (1) that defendant was stopped by the court from giving further testimony, (2) if permitted, defendant would have given evidence tending to show that plaintiff had extended the time for which defendant had paid for the use of the telephone beyond the date of the issuance of the writ in this case, (3) the court prevented defendant "from producing the evidence necessary to sustain his theory in the case." This is not the language of the motion but its material substance. Affidavits were filed with the motion, one made by defendant, one by his wife, and one by counsel who tried the cause. Those of defendant and his wife were to the effect that if they had been interrogated upon the subject they would have testified that plaintiff had told them in December, 1914,

"That he wanted me as his customer and he would fix this phone matter up and make it satisfactory and if he couldn't do so he would take the phone out in the spring, pay me back my rebate and remove the poles from in front of my place. Mr. Moore on that occasion said he knew we had not had service and I was entitled to a rebate of about six dollars and that we could have the phone till we used up the rebate."

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The affidavit of counsel is to the effect that he had not expected to try the cause, but only to assist in the trial, and he was not as familiar with the details of the testimony to be presented for defendant as otherwise he would have been, and had a mistaken idea of the character of some of the evidence, and, although prompted by defendant's wife while defendant was on the stand, failed to get the significance of her advice that there was the parol offer above referred to. The motion was denied.

OSTRANDER, C. J. (*after stating the facts*). In the brief for appellant (no brief has been presented by appellee) there is a contention made which proceeds upon the theory that the court stopped defendant from giving testimony. Upon the merits it is contended that defendant was entitled to the possession of the telephone for six months after February 1, "to use up the rebate of 6 months allowed him by the plaintiff; that this was plaintiff's usual method of adjusting rebates." It is further contended that the allowance of the rebate had the effect to renew the contract for the period for which the rebate would pay, and this independent of plaintiff's alleged express promise; that a new trial should have been granted, that whether—

"The conditions between plaintiff and defendant with reference to this telephone were such as to justify plaintiff in revoking defendant's contract was a question of fact to be determined by the jury."

Finally, it is said:

"There was enough testimony of defendant's theory of the case in the evidence to make an issue upon plaintiff's right to possession of the telephone sufficient that the jury should have been permitted to pass upon same; and we think it was error for the court to refuse it."

Defendant's counsel argues none of these, content-

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ing himself with their statement. It is obvious that the court did not stop defendant from giving testimony, and there can be no question concerning the duty of counsel, upon the suggestion of the court, to state, to offer to prove, facts believed by him to be material to the issue. I assume that if he had been informed he would have offered to prove, either by statement or by interrogating the witness, the facts set up in the motion for a new trial. As it was, it does not appear there was any available testimony, known to him, which was not given.

There is no testimony tending to prove that plaintiff had any method of adjusting rebates. There was no rebate *allowed* to defendant. But if there was a parol promise to repay him money, or to pay him money, it cannot affect the right of plaintiff to possess himself of the telephone and its attachments. There is no testimony tending to prove that defendant ever agreed to accept the use of the telephone in place of some sum due him as a rebate, or claimed by him to be so due, or offered to him as such. On the contrary, if the testimony establishes any fact beyond doubt, it is the fact that defendant did not want the telephone at all unless the Heifner boys were on the line, and, accepting his testimony as true, he never had proper, and often had no, service after August, 1914. The theory of a new contract is not only not supported by testimony but it is disproved by defendant's testimony. He testified that in January, 1915:

"I talked with Mr. Moore from Marlette over the telephone about the rebate, and also about placing the Heifner boys back on the line with me. He told me I could go to the bank and get the rebate."

It was not error to deny the motion for a new trial, because if the omitted testimony had been received it could not have changed the result. Nor can this court say it was an abuse of discretion for the trial court

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to refuse the excuse offered for the failure to offer the testimony at the trial.

Error is not made to appear, and the judgment is affirmed.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

BRADWAY *v.* MILLER.

1. EVIDENCE—ADMISSIONS—ABSTRACTS—TITLE TO LAND—QUESTION OF LAW.

   An admission of counsel at the hearing that the title shown by an abstract was not marketable is not one which would bind the court, since the question is one of law.

2. VENDOR AND PURCHASER—ABSTRACTS—MARKETABLE TITLE—CONTRACTS—VALIDITY.

   An agreement for a title to be shown to be marketable by an abstract thereof is good.

3. SPECIFIC PERFORMANCE—LAND CONTRACTS—ABSTRACT—TITLE TO LAND—PERFORMANCE.

   Specific performance of a contract for the sale of land is not a matter of strict right, but is a question for equitable consideration, and it will not be decreed at the instance of the vendor where the contract called for a marketable title to be shown by the abstract, and the abstract showed defects which it is more or less probable might be remedied by a decree quieting title if all discoverable, recordable facts under Act No. 123, Pub. Acts 1915 (3 Comp. Laws 1915, §§ 11736-11738), were presented to a court.

4. VENDOR AND PURCHASER—MORTGAGES—FORECLOSURE BY ADVERTISEMENT—POWER OF SALE—MARKETABLE TITLE.

   Where the abstract shows that the title rests upon the foreclosure of a mortgage by advertisement, but does not

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show that the mortgage contained a power of sale, a marketable title is not shown, since a foreclosure by advertisement is valid only where the mortgage contains a power of sale.

5. EVIDENCE—MORTGAGES—FORECLOSURE—SHERIFF'S DEED.
The recital in a sheriff's deed that a mortgage contains a power of sale is no evidence of that fact.

6. VENDOR AND PURCHASER—MARKETABLE TITLE—DESCRIPTION IN DEED.
A title is not marketable which rests upon a deed which essentially misdescribes the property conveyed.

7. SAME—ABSTRACTS—MARKETABLE TITLE—PERFORMANCE—SPECIFIC PERFORMANCE.
An agreement by the vendor in a land contract to furnish an abstract showing a marketable title is not complied with by evidence of adverse possession which might prevail in an ejectment suit or secure decree correcting the records, entitling him to specific performance of the contract.

8. SAME—ABSTRACTS—MARKETABLE TITLE—TIME TO PERFECT RECORD TITLE.
Plaintiff's request for time to perfect his record title was properly denied by the court below, in proceedings at his instance for the specific performance of a land contract in which he agreed to furnish abstract showing marketable title. Distinguishing *Schwartz* v. *Woodruff*, 132 Mich. 513.

Appeal from Oakland; Smith, J. Submitted January 22, 1918. (Docket No. 155.) Decided March 27, 1918.

Bill by Albert Bradway and another against Frank P. Miller for the foreclosure of a land contract. Defendant filed a cross-bill to rescind the contract and for an order for the return of the amount paid thereon. From a decree for defendant, plaintiffs appeal. Affirmed.

Henry B. Graves, for plaintiffs.

Albert McClatchey and *Firmon Lush*, for defendant.

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Plaintiffs, husband and wife, claim to have acquired title to, and in the year 1889 they moved to and made their home upon, land in Royal Oak township, Oakland county, described as the west half of northwest quarter and west half of east half of northwest quarter of section 7, town 1 north, of range 11 east, 120 acres, more or less. They were living on the land in March, 1916. By a writing dated March 25, 1916, defendant offered to buy the land from them and pay for it $700 an acre—$1,000 on acceptance of the offer, $2,000 on or before 10 days "from the time I am presented with an abstract of title to the said property certified to a date not earlier than the date of this agreement," $2,000 within 15 days from the expiration of the time for the payment of the above mentioned $2,000, $2,500 on May 1, 1916, and $17,500 on or before June 1, 1916, the balance, $59,000, more or less, to be paid by a mortgage due in 5 years, bearing interest at 6 per cent. The writing contains the stipulation and condition that the abstract be either a Crawford or Mathews abstract and that the same show a good and merchantable title to the said premises. An easement in the land is mentioned, and some other matters, not material here. On the same day this offer was accepted by plaintiffs, in writing, and $1,000 was paid on the purchase price. On the part of plaintiffs, the negotiations were carried on by their son, Judson Bradway.

A Crawford abstract, certified to March 30, 1916, was delivered to defendant April 1, 1916. Defendant paid $2,000 April 11, 1916, and $4,500 May 1, 1916, a total of $7,500. He paid no more. The bill in this cause was filed September 6, 1916.

Setting up the contract, the bill charges performance by plaintiffs of everything required to be done by them, willingness to complete performance of the contract on their part, default of defendant. It is

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prayed that defendant be decreed to perform and in default that the land may be sold and the proceeds applied to satisfy the amount due to plaintiffs, and for a decree for any deficiency arising upon such sale. Defendant answered and denied that an abstract conforming to the contract stipulation had been furnished him, alleging that in consequence and the rescinding of the agreement by defendant plaintiffs owe him $7,500, which sum, with interest therein, the court is asked to order plaintiffs to pay him. The answer also says that plaintiffs' authorized agent represented that the land was well worth $700 an acre and could be sold at any time for that price, that other land in the immediate vicinity of that in question and similarly located was selling for $700 and more an acre, and that defendant relied upon these representations when he entered into the agreement; that he has learned that the value of the land is less than $400 an acre, and that other as well located land in the immediate vicinity is for sale at $400 an acre. The answer does not specify the infirmity or infirmities of title shown by the abstract. The cross-bill was answered, the cause was heard in open court, the court made and filed a short opinion, and a decree was entered May 7, 1917, refusing plaintiffs relief and requiring them to pay to defendant $7,500 with interest from April 24, 1917, the day the cause was heard. A lien upon the land to secure payment of that sum is given to defendant.

The opinion filed by the trial court April 25, 1917, reads as follows:

"This is an equity action to foreclose a land contract. On March 25, 1916, plaintiff, Albert Bradway was the owner of the farm in question, about 120 acres. For farming purposes only, it may have been worth $100.00 per acre.

"From the fact that he sold unto defendant for $700.00 per acre he must have understood it was being

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bought for platting into lots or for some other speculative purpose. The contract recites that the defendant bought upon the condition, 'that the abstract * * * shall show a good and merchantable title to the premises.'

"A merchantable title is synonymous with the term marketable title. A marketable title has been defined by the courts of many States. It is unnecessary to refer to them. I find the abstract does not show a marketable title. Upon the argument plaintiffs' counsel frankly conceded the title as shown is not free from doubt and not merchantable. But he insists that the court should follow the disposition made of *Schwartz* v. *Woodruff*, 132 Mich. 513, and allow plaintiffs some such period as six months in which to remove the clouds upon the title, and to tender a new abstract. Inasmuch as this would delay the platting of the property and sale of lots until 1918, it might result in serious or irreparable loss to defendant. The circumstances appear to be different from those of *Schwartz* v. *Woodruff*. The conclusion reached is that defendant is entitled to have the contract rescinded and the money he has paid returned to him together with his taxable costs."

Plaintiffs have appealed, and, accepting the definition of merchantable title given by the trial court, insist (1) that the abstract shows a merchantable title, (2) that defendant has precluded himself from claiming that the abstract does not disclose a merchantable title. No testimony tending to prove any deceit or misleading of defendant having been offered, the defendant, appellee, says that the question involved is whether the title shown by the abstract is doubtful.

Appellants deny that in argument in the court below it was "frankly conceded" that the abstract does not show a marketable title, while appellee says that the concession was in fact made and that the statement in the opinion, about the fact, must be accepted by this court.

The abstract shows title to the land in George Blumburd, or George Blumberg, or George Bloom-

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burg (the name is spelled in different instruments as is indicated), in 1859. In 1872, a sheriff's deed, based upon an execution sale, was made to Philo Parsons. The judgment was obtained May 14, 1869, and the levy was made February 3, 1870. George Bloomburg and wife mortgaged the land November 13, 1868, to Stephen Baldwin, to secure payment of a debt due two years after that date, who assigned the mortgage January 2, 1869, to Reuben Adams. It does not appear that the mortgage contained a power of sale. It was foreclosed by advertisement, the land sold in two parcels, and a sheriff's deed given, dated May 9, 1874, which, however, describes the premises as being in town 2 north. The published notice of sale described them as in town 1 north. Reuben Adams, the assignee of the mortgagee, was the vendee, and in April, 1875, he gave a quitclaim deed of the premises in question to Israel Bickford,

"Hereby intending to convey all the right, title and interest the first party has acquired in said premises by reason of the foreclosure of a mortgage given by George Bloomburg and wife to Stephen Baldwin, recorded * * *, and the said party of the first part authorized the said second part to receive all moneys paid for the redemption of said premises or any part of the same as he might of done."

A quitclaim deed was made April 10, 1875, in which Philo Parsons and Ann Eliza Parsons are described as grantors, conveying the land to Israel Bickford; Philo Parsons only signed and acknowledged the deed. Israel Bickford and wife conveyed the land in February, 1876, to Rollin Bickford, and Rollin Bickford alone conveyed to plaintiff Albert Bradway in March, 1883. The deed does not state whether Rollin Bickford was a married man. The abstract, as printed in the record, contains also two affidavits, appearing therein as numbers 18 and 19, made apparently in

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March, 1916, but showing no recording date. The first of these is to the effect that Reuben P. Adams, of Southfield, Oakland county, Michigan, "who died about the year 1892," left surviving him a wife, who died "about 1896." The other is to the effect that the wife of Rollin Bickford died while living upon the premises in question and prior to March 7, 1883.

It is not claimed that defendant ever pointed out particular defects in the title, and both plaintiffs and Judson Bradway testified that no complaint was ever made to them about the abstract or the title or that delay in making payments and in closing the transaction was the result of a delay in making an examination thereof by defendant's attorney. It was at the hearing that defendant first pointed out the alleged defects. But defendant testified that the payments were made before the abstract had been examined, in reliance upon an assurance given by Judson Bradway that the title was good, and if not, money paid would be refunded. He testified further that he explained to Albert Bradway that the delay was caused by the absence of his attorney, that when he received the opinion of his attorney he notified Judson Bradway by 'phone shortly after June 6, 1916, that the title was defective, referred him to his attorney, said he would not purchase, and was told that no better title would be furnished. The defects alleged are (1) that the deed from Philo Parsons to Israel Bickford, not signed by Ann Eliza Parsons, is suspicious, and if the land was a homestead, and she was his wife, it was void, (2) the mortgage from George Bloomburg and wife to Stephen Baldwin contained no power of sale (as shown by abstract) and therefore the foreclosure by advertisement was presumptively void, (3) the deed given in the foreclosure proceeding misdescribes the land, (4) the deed from Rollin Bickford to Albert Bradway is not signed by the wife of Bickford and the

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property may have been a homestead and the deed therefore void; the affidavit of Lydia Blodgett to the effect that the wife died before the deed was made was suspicious because sworn to before Judson Bradway, (5) the deed from Adams to Israel Bickford is a limited quitclaim deed and does not purport to convey all of the right, title and interest of the grantor but only so much as he acquired by reason of the foreclosure proceeding; it does not appear whether Adams was a married man.

OSTRANDER, C. J. (*after stating the facts*). 1. Whether an abstract shows a title is a question of law. Lawyers may differ in opinion, but nevertheless the question when presented to a court must be answered as the applicable law requires. Therefore, an admission of counsel at the hearing, if one was made, that the title shown by the abstract was not marketable, while it would naturally affect the court and perhaps prevent further examination of the question by the court, is not one which would bind the court.

2. An agreement for a title to be shown to be marketable by an abstract thereof is good. *Lake Erie Land Co.* v. *Chilinski*, 197 Mich. 214; *Ogooshevitz* v. *Arnold*, 197 Mich. 203. See, also, *Ford* v. *Wright*, 114 Mich. 122, 130; *Walker* v. *Gillman*, 127 Mich. 269.

3. Specific performance of a contract for the sale of land is not matter of strict right and whether it will be ordered is a question for equitable consideration. A purchaser may suffer a loss if compelled to take a doubtful title, while the vendor can usually suffer only the inconvenience of delay, if his title is good and the purchaser is released. Maupin on Marketable Title, p. 708. Nor, in a case like this, should what appears upon the abstract be confused with or enlarged by what it is more or less probable would appear if all discoverable, recordable, facts were presented or with

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provable facts showing a title good in law but not of record; as, for example, a title by adverse possession. In this connection, it is to be observed that although the statute, Act No. 123, Public Acts of 1915 (3 Comp. Laws 1915, §§ 11736-11738), permits affidavits detailing certain facts to be recorded and makes such recorded affidavits *prima facie* evidence, in courts, of the facts and circumstances contained, such affidavits may and often do merely point to evidence which would, if not disputed, support a decree quieting title or one reforming an instrument.

4. A foreclosure of a mortgage by advertisement is valid only where the mortgage contains a power of sale, and an agreement like the one before us is not complied with if the title rests upon a foreclosure by advertisement and the abstract does not show that the mortgage contained a power of sale. The recital in the sheriff's deed that the mortgage contains the power is no evidence of the fact. *Bryan* v. *Straus Bros. & Co.*, 157 Mich. 49. This was an action of assumpsit by vendors upon a land contract.

5. A title is not marketable which rests upon a deed which essentially misdescribes the property conveyed; as when, as in this case, the land is described in the deed as being in a township other than the one in which the land which is abstracted lies.

6. Plaintiffs say that inasmuch as Reuben Adams, vendee in the deed given in the foreclosure proceeding, afterwards executed the conveyance to Israel Bickford, who also acquired such title as Philo Parsons took upon the execution sale, it is immaterial as affecting title whether the foreclosure was valid or invalid, or whether the foreclosure deed correctly describes the land. Parsons, the purchaser at execution sale, had the right to redeem from the mortgage which Reuben Adams owned. Israel Bickford acquired Parsons' interest and right and also acquired Adams'

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interest. Adams' quitclaim deed, if not a conveyance of title, may be treated as at least an assignment of the mortgage. There was then no outstanding interest or title. It is further the argument of plaintiffs that the mortgage was either foreclosed or it was not. If not, it became due in November, 1870, since which date more than 45 years have elapsed. But, clearly, plaintiffs' title rests either upon the foreclosure of a mortgage or upon the deed from Mr. Parsons, or upon both, and the validity of each is doubtful. That plaintiffs as defendants might maintain title in an ejectment suit or secure decrees correcting the records, does not answer the specifications of the contract which calls for a title shown by the abstract of title to be merchantable. One informed about all the facts might be willing to purchase the land, accepting a deed from plaintiffs, but that is not the test to be applied. See *Ford* v. *Wright, Walker* v. *Gillman, supra; Stange* v. *Gosse,* 110 Mich. 153.

7. In *Schwartz* v. *Woodruff,* 132 Mich. 513, the action was like the one at bar, but there was no question there of an abstract title. The agreement there was for a good and sufficient conveyance in fee simple, free and clear, etc. The purchase price being all due and a conveyance tendered the purchaser, he declined to accept it upon the sole ground that he did not have the money. There was, in fact, a defective title of record, but the defect was one which the vendor could remedy. And so it was held that as an injustice would result to the defendant purchaser if he was compelled to pay the difference between what could be obtained for a questionable title and what he had agreed to pay for a title free from question, the decree required the vendor to obtain and record the conveyance which would perfect the record title. In the case at bar, the plaintiffs ask for time to perfect their record title. The court below refused this for a reason stated in

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the opinion. This reason seems to me to be based upon facts fairly inferable from the evidence in the case and to be sufficient.

The decree is affirmed, with costs to defendant.

BIRD, MOORE, STEERE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

WILLIAMSON *v.* HANNAN.

1. FRAUD—MISREPRESENTATIONS—MATERIALITY—ROOMING HOUSE.
   Representations in the sale of a rooming house business and furniture as to the income and respectability of the place, if false, were material.

2. SAME—BROKERS—CONSPIRACY—EVIDENCE—SUFFICIENCY.
   In an action by the buyer against the broker, his agent and the owner of a rooming house business for fraud in the sale of same, evidence examined, and *held*, insufficient to sustain the allegation that the representation that the neighborhood was respectable was false, that the broker's agent represented, as a fact, the income, and that the owner and broker's agent were in confederation to deceive plaintiff.

3. SAME—NOTICE—SILENCE—EVIDENCE.
   In the absence of evidence that defendant broker's agent had any knowledge of the reputation or character of any of the roomers of a rooming house, his silence on that subject, and as to whether they would remain in the house for any length of time, was no evidence of fraudulent design on his part, in making a sale of the business.

4. SAME—CONTRACTS—DISAFFIRMANCE—TRIAL.
   In an action for damages for fraud and deceit in the sale of a rooming house business, it is immaterial, as affecting

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the cause of action, whether plaintiff did or did not disaffirm the contract, hence the action of the court below in submitting that question to the jury, limiting the damages to the amount paid, with interest, was not reversible error.

5. SAME — BROKERS — MISREPRESENTATIONS — INTENT — TRIAL — INSTRUCTIONS.

In such action, the broker and his agent being joint defendants with the owner, requested instructions that the broker and his agent could not be held liable unless the statements made by the agent were known by him to be false and were made with intent to deceive and defraud, should have been given.

Error to Wayne; Chester, J., presiding. Submitted April 13, 1917. (Docket No. 148.) Decided September 27, 1917. Reargued February 1, 1918. Former opinion vacated March 28, 1918.

Assumpsit by Margaret Williamson against W. W. Hannan, William Devlin, and others for fraud and deceit in the sale of a rooming house business. Judgment for plaintiff. Defendants bring error. Reversed as to all but defendant Devlin.

Stellwagen & MacKay and *Daniel E. Wade*, for appellants.

Edward Pokorny, for appellee.

In this cause an opinion affirming the judgment was filed September 27, 1917. The opinion has not been published, a motion for a rehearing having been made October 6, 1917, by defendants other than Devlin, and a rehearing granted. Being convinced that a wrong conclusion was reached, the former opinion is withdrawn, the following to stand as the opinion of the court:

In a declaration, to which no formal objection was made, plaintiff alleges, in substance and effect, that

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defendants, on February 23, 1914, with intent to cheat and defraud her, and induce her to purchase from the defendant Devlin the good will and contents of a certain rooming house—furniture, fixtures, carpets, rugs, etc.,—at No. 485, Grand River avenue, Detroit, and to pay to said Devlin therefor the sum of $1,650, falsely and fraudulently represented to her

"That the said rooming house business was located in a desirable and respectable neighborhood, and the roomers in said rooming house were respectable and hard working people, and that the income of said rooming house business was two hundred and fifteen ($215.00) dollars per month; whereupon and by means of said false and fraudulent representations of the said defendants the said plaintiff was induced to and did purchase said rooming house business and contents therein of the said defendant, William Devlin, and then and there paid to said defendant, Martin F. Gainey, in the form of a check payable to the order of W. W. Hannan, for and on behalf of the said defendant, William Devlin, for the purchase price of said rooming house business and contents therein, a large sum of money, to-wit, nine hundred ($900.00) dollars, and for the balance of the purchase price to-wit, seven hundred and fifty ($750.00) dollars, gave a chattel mortgage on the contents of said rooming house business to said defendant, William Devlin."

The alleged fraudulent representations are negatived, it being alleged that the rooming house is in an undesirable and disreputable neighborhood, the roomers therein drunkards, and the female roomers women of disrepute and bad character; the monthly income was only $125 a month. Damages "in her property rights" to the amount of, to wit, $2,000, are alleged, and she pleads 3 Comp. Laws, §§ 10421, 10422 (3 Comp. Laws 1915, §§ 12350, 12383), as a provision permitting her to maintain an action of assumpsit to recover said damages. The defendants are W. W. Hannan, his clerk and agent, Gainey, and Devlin, the owner of the property. Devlin listed the property for

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sale with Hannan, who conducts a rental agency and real estate exchange. As is usual, a card was made for the use of the office, describing the property. This was but one of several like properties so listed for sale with the defendant Hannan.

The plaintiff gave testimony tending to prove that she is a widow, with four children, and that she came from Boston to Detroit February 12, 1914, with the purpose of buying a lodging house. By a friend she was introduced at the Hannan office, made her desire known and that she had $1,000 in cash. She did not see and did no business whatever with Mr. Hannan personally. Mr. Gainey gave her several addresses, and with her friend plaintiff visited three of them and found them not satisfactory. She returned to Mr. Gainey, who gave her other addresses and took her to see several houses. She was not pleased with them. Then he took her to No. 485, Grand River avenue, where she met Mr. Devlin. There were 19 rooms in the place, which was in the business section, and occupied two floors above the street floor. She saw all of the rooms, all of which were furnished. She asked Mr. Devlin if it was a respectable house and he replied, "thoroughly so." She was told by Mr. Devlin, "You never hear or see any more than you do now," and that the roomers were steady roomers, all of them having been there when a Mrs. Shoemaker, of whom he had purchased, had the house. Plaintiff liked the rooms, and it appeared a respectable place. She, however, went to see three other rooming houses, but they did not please her as well as 485 Grand River, which she was told she could buy for $1,600. This occurred on Monday, February 16. Monday evening, plaintiff went to the head of the Young Women's Christian Association and talked with her, and with her visited No. 485 Tuesday morning. She had lived in Detroit seven years, and expressed the opinion that the neigh-

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borhood was respectable. However, plaintiff asked to see other rooming houses and with Mr. Gainey saw one other. She suggested then that an inventory be taken of No. 485. One was taken, everything being listed. Everything was inspected by her, or was open for inspection. She was told what each room rented for, what the lease she would assume called for, and what the other fixed expense charges were, as for lights, water, etc. At her request, Mr. Gainey made some figures showing income and disbursements, according to which the rents then were $215 and the expenses $130 monthly. Gainey made the figures from Devlin's statements, made in her presence. She was to have possession when it appeared that her check had been honored. She did not close the transaction or sign any papers until Tuesday, February 24. On the morning of that day, she, with Gainey and Devlin, went a second time over the inventory. She went over herself the rents and expenses as they had been represented. She could not, she says, arrive at the result Gainey had arrived at. She then, she says, on Tuesday afternoon, before taking possession, before executing the necessary papers, told Mr. Gainey that he had cheated her and that she wanted her money back.

"I says, 'There isn't the money in that house you said there was for me,' and he says, 'Woman,' he says, 'you are excited,' he says. 'With them rooms empty that stood upstairs,' he says, 'You have $65.' 'Well, then,' I says, 'I must have missed some of the rooms, for I couldn't get it like that.' "

He asked her to sign the papers, she said she was too nervous, but signed them, but did not know what she signed. Then she went up and took possession. One roomer who paid $12 a month for her suite moved out on February 25. On that day she saw Mr. Gainey and told him she was cheated. He said she was not and went with her to see the friend who had introduced her to the agency. Gainey said to the friend,

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" 'Mrs. Williamson thinks she has been cheated with the house but she hasn't. I will sell it again and get more than she paid for it.' I said 'Mr. Gainey, sell it. I only want what I gave you.' "

Plaintiff later became convinced, she says, that some of the women roomers were not respectable. Some of them drank beer and smoked cigarettes in their rooms. Telephone calls for some of them were not infrequently answered by her, and she heard parts of conversations they carried on by 'phone. Others of the roomers moved out. The income for the first month was $110, the second month $60, the third $66.50. She had agreed to make deferred payments for the furniture, and had the rent to pay. In March, she called on Devlin, telling him "to come and take his stuff, I wanted nothing to do with it." The landlord asked her to move because her rent was not paid. She did move, with the furnishings, to Brooklyn avenue, and later on, when Devlin learned where she was, he replevined his property and sold it. Hannan, agent for Devlin, received out of the money paid by plaintiff a commission for services.

When plaintiff rested, motions were made to direct a verdict for defendants, and were overruled. The motions were renewed and denied when defendants rested. Plaintiff then moved, and over objection was granted leave, to amend the declaration by an allegation that on or about February 26th plaintiff

—"offered to the defendants to return the property which they had sold to her and demanded the payment of her money.

"*The Court:* And the surrender of the contract, was that included?

"*Mr. Pokorny:* Yes, your Honor, the surrender of the contract."

It does not appear that the amendment was actually made. The jury returned a verdict against all of the

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defendants for $900 and interest—in all, $973.37, and judgment was entered on the verdict.

Much of the testimony given by plaintiff is disputed and contradicted by testimony for defendants. Their motions for a new trial were denied. There are 13 specific assignments of error. Those argued are based upon the denial of a directed verdict, refusals to charge as requested, and the charge as given, the denial of the motion for a new trial.

The court was requested by the attorneys for Hannan and Gainey to charge the jury:

"34. I charge you that even though you find that this plaintiff is entitled to recover damages in this case, you cannot render a verdict against Mr. Gainey —Mr. Hannan—The Hannan Real Estate Agency, or the Hannan Rental Agency, unless you find that Mr. Gainey personally had knowledge of the false and fraudulent representations and that he made them knowingly and with the intention to deceive and defraud this plaintiff.

"35. I charge you that if you find that Mr. Gainey did make these statements and representations to plaintiff, and that they were false and fraudulent, and that Mr. Gainey was only repeating what Mr. Devlin had told him, Mr. Gainey not knowing they were false and fraudulent, then your verdict must be against Mr. Devlin alone, and not against Mr. Gainey, Mr. Hannan, The Hannan Real Estate Exchange, or the Hannan Rental Agency."

Neither these nor the equivalents of them were given. The jury was told, among other things:

"Gentlemen, you are instructed that the Hannan Real Estate Exchange is composed of W. W. Hannan alone, and that W. W. Hannan and the Real Estate Exchange are identical; and you are instructed that Mr. Gainey was the agent of W. W. Hannan for the purpose of selling this rooming house; that they were the agents of Mr. Devlin, and in this connection you are instructed that any material representations made by Mr. Gainey in the course of his employment binds himself as well as Mr. Hannan, and it binds Mr. Han-

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nan as well as himself; but if these representations were not made in the course of his employment it would not bind Mr. Hannan, but would bind himself. * * *

"With reference to the relationship of Mr. Gainey and Mr. Hannan and Mr. Devlin. Mr. Devlin was the principal owner of this property, he placed this property with Mr. Hannan, Mr. Hannan was his agent. Mr. Gainey was in the employ of Mr. Hannan and was Mr. Hannan's agent and indirectly Mr. Devlin's agent in disposing of this property. Plaintiff claims that Mr. Gainey made certain representations about which I have instructed you. If Mr. Gainey made those false representations under the instructions I have given you and it was within the scope of his employment then that would bind his principal, Mr. Hannan, and also the principal Mr. Devlin. In this connection I charge you if Mr. Gainey received information from Mr. Devlin regarding this rooming house and believed it and repeated it to this plaintiff after explaining that he had no personal knowledge of the facts, he isn't guilty of fraud. Therefore, if you find that Mr. Gainey received such information from Mr. Devlin and repeated that information to this plaintiff and explained to her the source of his opinion, he isn't guilty of fraud if he acted honestly and in good faith, and under those circumstances your verdict would be no cause of action as against Mr. Gainey and Mr. Hannan."

Error is assigned upon the refusal to charge as requested and upon the charge. Separate requests to charge were presented on behalf of defendant Devlin. Without setting them out, various of the contentions of appellant, argued in the brief and orally at the hearing, are answered in the opinion.

OSTRANDER, C. J. (*after stating the facts*). What was purchased by plaintiff and sold to her was not merely furniture and furnishings for a rooming house, but was the furniture and furnishings of a rooming house doing business—the furniture and furnishings in use by tenants in a rooming house. It is true the

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contract, reduced to writing, does not mention good will, or business, as consideration for what plaintiff was to pay. It does describe the property as per inventory and as "contained in the rooming house located at No. 485 Grand River avenue, second and third floors, Detroit, Michigan."

We cannot say, therefore, that if representations such as are alleged to have been made were made, and were false, they were not material. I doubt, however, if it can be fairly said there is testimony tending to sustain the allegation that the representation that the neighborhood was respectable was false. It is doubtful, too, whether defendant Gainey is shown by the testimony to have represented, as a fact, the income of the rooming house business. The testimony indicates, rather, that for the information concerning the rates for which rooms were rented, as well as for that concerning the cost of operation, Gainey, to the knowledge, and in the presence, of plaintiff, relied upon—that both relied upon—the representations of Devlin. That would be the usual thing to do. I think there is no evidence of the confederation of Gainey and Devlin to deceive plaintiff.

I do not find testimony tending to prove that Mr. Gainey made any representations concerning the character of the inmates of the house, or that he expressed the opinion that any roomer would remain in the house for any period of time. There is no testimony tending to prove that he knew the reputation or the character of any roomer. His silence, therefore, upon that subject would be no evidence of fraudulent design.

In the motion for a new trial, one reason assigned is that the verdict was against the weight of evidence. But in the brief no point is made that there ought to be a reversal here because the verdict is against the weight of evidence.

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Plainly, the plaintiff's case is one for damages for injury suffered on account of the alleged fraud and deceit practiced by the defendants. As affecting the *cause* of action, it is immaterial whether plaintiff did or did not affirm or disaffirm the contract, whatever may have been the effect, as evidence, of the alleged disaffirmance. It is to be noticed, too, that when the alleged disaffirmance was made, or attempted, plaintiff had not learned either that the neighborhood or the roomers were not respectable, and did not make either of these facts a reason for believing herself defrauded. The evidence is convincing that she did not disaffirm at any time, but the course taken at the trial upon this subject and the submission to the jury of the question whether there was a rescission was not, I think, reversible error since, taken with the instruction concerning the measure of damages, it was harmless. The defendants requested the court to charge upon the subject of damages (protesting, of course, that no verdict for plaintiff ought to be returned), and the court instructed, that the recovery must be limited to the sum of nine hundred dollars, with interest and costs, concluding the request with the statement, "There is no testimony of any other damages incurred."

The position taken by counsel for the defendants other than Devlin, the position indicated in requests to charge and in various motions, was that they could not be held liable unless the statements made by Gainey were known to be false and were made with intent to deceive and defraud. Upon this point the trial court did not entirely agree with them as the requests to charge refused and the charge given show. The requests preferred, or the substance and effect of them, should have been given. *Aldrich* v. *Scribner*, 154 Mich. 23.

As to defendant Devlin, there is testimony tending

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to prove some of the alleged representations and their falsity. No reason appears for reversing the judgment as to him. As to the other defendants it is reversed and a new trial granted. As defendants joined in the appeal and in presenting the case here, no costs will be awarded.

BIRD, MOORE, STEERE, FELLOWS, STONE. and KUHN, JJ., concurred. BROOKE, J., did not sit.

CITY OF DETROIT *v.* KRESGE.

1. TAXATION—CONSTITUTIONAL LAW—DOUBLE TAXATION.
   The constitutional requirement of equal taxation, the ground for refusing double or duplicate taxation, has no application in cases where the alleged double taxation was not imposed by the same sovereignty.

2. SAME—CORPORATE STOCK—DOUBLE TAXATION.
   The taxation of shares of stock of a Michigan corporation, some of the property of the corporation being within and some without the State, and taxed where situated, is not double taxation.

3. SAME—CORPORATE STOCK—EXEMPTIONS.
   The property of a Michigan corporation owning property within and without the State is taxable to itself, and therefore the shares of such corporation are exempt from taxation under section 4002, subd. 7, 1 Comp. Laws 1915.

   Per OSTRANDER, C. J., and STEERE, BROOKE, and STONE, JJ.

Error to Wayne; Hally, J. Submitted October 17, 1917. (Docket No. 143.) Decided March 28, 1918. Rehearing denied June 20, 1918.

Assumpsit by the city of Detroit against Sebastian S. Kresge for the amount of an assessment for taxes.

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Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Walter Barlow (*Harry J. Dingeman,* of counsel), for appellant.

Donnelly, Lyster & Munro and *John H. Brennan,* for appellee.

MOORE, J. In this case it was stipulated as follows:

"Mr. Kresge is a resident of Detroit. The board of assessors in April, 1917, in making up the personal tax rolls, assessed him in the amount of $20,000. Subsequently the board of review increased his assessment to $3,000,000, after notice to him of their intention so to do. Mr. Kresge petitioned the board of review to reduce his proposed assessment of $3,000,000 to $5,429.18. * * * In his sworn statement Mr. Kresge, in answer to question Number 12, therein lists 66,548 shares of the common capital stock of the S. S. Kresge Company, of the par value of $100 per share. This company is a Michigan corporation formed under Act No. 232 of the Public Acts of 1903, as amended, commonly known as the Denby act. The company has an authorized and outstanding capital stock of $2,000,000 preferred stock and $10,000,000 common stock, shares worth $100 each, par value. In the tax statement, Mr. Kresge expressly claimed that the shares of stock in this company were exempt from taxation in this State. The board of review denied his petition and confirmed the assessment at the sum of $3,000,000. Mr. Kresge had an interview with the board of review, in which his shares of stock in the above company were discussed, and the board of review was advised by Mr. Barlow, chief assistant corporation counsel, that the shares of stock belonging to the petitioner were taxable, not for their cash value, but for a proportionate amount depending upon the proportion between the taxable property of the corporation outside of the State to its taxable property inside the State. Mr. Kresge, being asked what proportion of the property of the company was outside the State, stated that to the best of his opinion it

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amounted to about 80 per cent. and 20 per cent. is located within this State. The amount of the assessment made by the board of review was based upon the amount of the property of the company so stated to be outside the State. It is conceded that Mr. Kresge's entire personal assessment for the year 1917 is based upon his ownership of these shares of stock.

"Mr. Kresge appealed from the decision of the board of review to the board of State tax commissioners, who sustained the assessment.

"The company is engaged in conducting mercantile establishments and stores for the sale of goods not only in Michigan, where it has quite a number of stores, but also has stores in 21 other States and in the District of Columbia; that the company owns no real estate, but has personal property at its stores in Michigan and in the other States, consisting principally of its stock of goods for sale at its several stores, and of the furniture and fixtures used in connection with the stores; that its property is of the same character in other jurisdictions as in Michigan, and that the company pays taxes upon such property wherever it maintains a store, not only in Michigan, but in other States. The articles that constitute the stock of goods on sale at the several stores of the S. S. Kresge Company outside of Michigan are not, as a general rule, shipped from or supplied from a depot or warehouse in this State, but are shipped direct from the manufacturer or parties from whom they are purchased, to the particular store where they are to be kept for sale.

"The S. S. Kresge Company is licensed to do business in the 21 other States and District of Columbia mentioned above, and does business there in its own name as a Michigan corporation. * * *

"It was proven on the trial that there was a general city tax of $41,426.64 levied against the defendant by the board of assessors of the city of Detroit on the basis of a personal property valuation of $3,000,000 assessed against him for the year 1917, and that there was a penalty of one per cent., $414.26, to be added thereto by reason of the non-payment of said original tax during the month of July, 1917, within which month Detroit city taxes are payable without addition thereto under the provision of the city charter. The

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total amount of the tax due to the plaintiff from the defendant, if anything, was therefore $41,840.90 at the date of the trial."

The court directed a verdict in favor of the defendant. The case is here by writ of error.

Counsel are agreed that the only question involved is whether the court should have directed a verdict in favor of the plaintiff in the sum of $41,840.90, instead of directing a verdict in favor of the defendant.

The claim of counsel for the appellant is clearly and concisely stated as follows:

"It is double taxation for the same State, as Michigan, to tax the property and stock of the same corporation, whether domestic or foreign; but it is not double taxation for one State to tax property, and another State to tax the stock of the same corporation.

"Illustration: The stock of a foreign corporation, owned by a citizen of Michigan, is taxable by this State, though such corporation pays taxes to another State on all its property. *Bacon* v. *Board of State Tax Com'rs,* 126 Mich. 22.

"The stock of a foreign corporation, owned by a citizen of Michigan is not taxable by this State, if all of its property is taxed in Michigan. *Stroh* v. *City of Detroit,* 131 Mich. 109.

"The stock of a foreign corporation, owned by a citizen of Michigan, is taxable in Michigan, though such corporation pays taxes in Michigan on part of its property and taxes to other States on the rest; but it is so taxable less a *pro rata* reduction for the value of its property taxed in Michigan. *Thrall* v. *Guiney,* 141 Mich. 392.

"Shares of stock of foreign and domestic corporations have been, and are taxable alike, notwithstanding the apparent difference in the wording of the statutory provisions. *Stroh* v. *City of Detroit, supra.* page 115.

"General Principle: It is legal for this State to tax stock of corporations whether foreign or domestic, to its citizen stockholders, insofar as it does not tax their property to such corporations, viz.: If all of the corporate property is inside Michigan. Michigan

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may not tax the stock at all; if all of the corporate property is outside Michigan, Michigan may tax the full value of the stock; and if part of the property is inside Michigan and part outside, Michigan may tax part of the value of the stock, but only part, for allowance must be made for the corporate property taxed in Michigan.

"In all three of these leading Michigan cases the court applied the rule of equitable taxation by giving the shareholders in the corporations therein mentioned the benefit of the exemptions specified in subdivision 7 of section 4002 of our statute (1 Comp. Laws 1915). The corporations in those cases were all foreign corporations, and giving subdivision 9 of said section a literal or strict construction all of the shares of foreign corporations owned by residents here would be subject to taxation here whether such corporations paid taxes on their property here or not.

"Subdivision seven of this section of the statute exempts shares of stock in a corporation from taxation only so far as the property of the corporation located here is exempt from taxation and insofar as taxes are paid on such property in this State. The payments of taxes on its property here is the reason why its shares of stock are not taxable to its shareholders residing here."

In *Bacon* v. *Board of State Tax Com'rs, supra,* Justice LONG, speaking for the court said:

"There are the questions of policy and abstract justice involved, both protesting against double taxation, but the legislatures of the States are judges of both policy and propriety so long as the constitutions have not forbidden it, and the weight of authority supports the claim that, in the absence of clear and express prohibition, they have not."

The stock assessed in that case was stock in a foreign corporation and the assessment was sustained for the reason that subdivision 9 provides for the assessment of "all shares in foreign corporations, except in national banks, owned by citizens of this State."

There is a clear intimation that a different result

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would have been reached had the stock been that of a domestic corporation. Clearly that case is not controlling of the instant case.

In *Stroh* v. *City of Detroit, supra,* Justice HOOKER in speaking for the court said:

"The Constitution of this State requires that there be a uniform rule of taxation and we have held that this forbids double taxation; and while double taxation may occur under any law, and that fact may, perhaps, not invalidate an act not intended nor calculated to impose it, and may not invalidate assessments made under it and according to its provisions, a law which in its terms necessarily requires it, under ordinary conditions, must be held invalid, or so construed as to avoid it. *Comstock* v. *City of Grand Rapids,* 54 Mich. 641 (20 N. W. 623); *Attorney General* v. *Board of Sup'rs of Sanilac Co.,* 71 Mich. 16 (38 N. W. 639); *Standard Life & Accident Ins. Co.* v. *Board of Assessors of Detroit,* 95 Mich. 468 (55 N. W. 112); *Detroit Citizens' St. Ry. Co.* v. *Common Council of Detroit,* 125 Mich. 675 (85 N. W. 96, 86 N. W. 809). * * *

"The taxation of shares to the shareholder, and property to the corporation, is clearly double taxation, within the spirit of the constitutional provision, and while we appreciate the fact that the shareholders and the corporation are different entities in the law, and that shares of stock are recognized as property, and distinct from the corporate property, it is plain that the shareholders are the corporation, and that they are the owners of its property. The Constitution does not permit the taxation of both property and shares, and we must, if possible, give such a construction to the law as to make it reconcilable with the Constitution."

In that case it was held that stock in a foreign corporation owned by a resident of the State could not be assessed where the property of the corporation was in this State and was taxed. Clearly this decision does not help the appellant.

In the case of *Thrall* v. *Guiney, supra,* the stock as-

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sessed was stock of a foreign corporation, and it was claimed should have been exempt because of the provisions of subd. 5, reading:

"5. All goods, chattels, and effects belonging to inhabitants of this State, situate without this State, except that property actually and permanently invested in business in another State shall not be included"

and this court held that the language did not sustain the claim, and allowed the assessment to stand. What the result would have been in case the stock assessed was in a domestic corporation does not appear.

In *Union Trust Co.* v. *Detroit Common Council*, 170 Mich., at p. 699, Justice STONE, speaking for the court, said:

"This brings us to the second question raised by respondents, whether or not the relator can use the stocks owned by it in other Michigan corporations, which pay taxes in Michigan on their property, as an offset.

"It is the claim of relator that, insofar as stocks in corporations are concerned there can be no question that such stocks are exempt from taxation, and their value should be deducted from the taxable capital of relator. 1 Comp. Laws, § 3831 (1 Comp. Laws 1915, § 4002), subd. 7:

"'For the purposes of taxation, personal property shall include * * * (7) all shares in corporations organized under the laws of this State, when the property of such corporations is not exempt, or is not taxable to itself; or when the personal property is not taxed.'

"In the construction of this section due consideration should be given to section 3834 (1 Comp. Laws 1915, § 4005), which provides that all corporate property, except where some other provision is made by law, shall be assessed to the corporation, in the name of the corporation. *Stroh* v. *City of Detroit*, 131 Mich. 109 (90 N. W. 1029); *Bacon* v. *Board of State Tax Com'rs*, 126 Mich. 22 (85 N. W. 307, 60 L. R. A. 321, 86 Am. St. Rep. 524); *Thrall* v. *Guiney*, 141 Mich. 392 (104 N. W. 646, 113 Am. St. Rep. 528). We think that relator is right in this claim."

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No Michigan case is called to our attention that is on all fours with the case before us, and it may be well to refer to the provisions of the statutes that are at all applicable.

The Kresge Company is organized under chapter 258, 4 How. Stat. [2d Ed.] (2 Comp. Laws 1915, chap. 175).

Section 31 (4 How. Stat. [2d Ed.] § 9562; 2 Comp. Laws 1915, § 9046) reads:

"All corporations formed or existing under this act shall be liable to be assessed for all real and personal estate held by them in this State, at its true value, and shall pay thereon a tax for township, village, city, county and State purposes, the same as other real and personal estate, and such tax shall be assessed, collected and paid in the same manner as other taxes on real and personal estate are required to be assessed, collected and paid: *Provided,* Nothing herein contained shall authorize the taxing of the capital stock of such corporation as such capital stock."

It must be apparent that the capital stock should not be assessed as capital stock. Clearly there is no authorization in this section of the statute for doing what the appellant seeks to have done.

Similar statutes were before the supreme court in Kentucky, in the case of *Commonwealth* v. *Walsh's Trustee,* 133 Ky. 103, and *Commonwealth* v. *Trust Co.,* 147 Ky. 77. In the last named case it was contended as it is contended here, that as some of the property of the corporation was located outside of Kentucky, and paid taxes in another State and not in Kentucky, the stock might be assessed in Kentucky.

In disposing of the case the court said in part:

"The construction demanded by the commonwealth would lead us to the decision that if a Kentucky manufacturing or trading non-franchise corporation were, at any time in the pursuit of its lawful business, to become the holder of any considerable property outside of the State of Kentucky, the holders of its shares of

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stock would at once have to list same for taxation; whereas, if the corporation should confine its property holding entirely to Kentucky, its shareholders would not need to list their shares nor submit to a tax upon them. The legislature can hardly have meant to create so unjust a condition. The construction claimed would mean that a Kentucky plant, in order that its shares might not be a separate subject of taxation, must restrict its operations, or rather its property holdings, entirely to the State, and thus be denied the opportunities which thrift and enterprise might give to it by establishing itself in other states as well. * * *

"In the language of section 4085, considered alone, is to be found a strong argument upholding our view of its intent; as well as negativing the commonwealth's theory that all its property must be tax-paid in Kentucky before the stockholders' exemption arises. The statute provides that 'the property of all corporations * * * shall be assessed in the name of the corporation in the same manner as that of a natural person * * * and so long as said corporation pays the taxes on all its property of every kind, the individual stockholders shall not be required to list their shares in said corporation.' Now upon what property, reading the statute in its entirety, must the corporation pay its taxes, before the stockholder's exemption arises? The answer is found in the statute itself and means, of course, that the corporation shall pay taxes upon the property 'assessed in the name of the corporation.' Manifestly the corporation could not pay taxes in Kentucky upon property assessed in some other State. The section of the statute, therefore, answers itself, and makes its meaning clear, *i. e.:* when the corporation has paid the taxes on all its property in Kentucky, assessed in its name, the holder of shares of stock in it need not list them for taxation."

We quote part of section 4002, 1 Comp. Laws 1915:

"For the purposes of taxation personal property shall include: * * *

"7. All shares in corporations organized under the laws of this State, when the property of such corporations is not exempt, or is not taxable to itself; or when the personal property is not taxed."

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Whether the assessment of the stock shall stand depends upon the construction put upon this subdivision. The argument of the appellant is that, as the personal property of the Kresge Company is not taxed in this State, the stock owned by the resident of the State should be taxed.

The language of subdivision 7 is not ambiguous. The shares of stock may be placed on the assessment roll when the personal property of the corporation is not taxed. Not taxed where? The appellant says in this State. The statute does not so read, and we are not justified in reading into it something the legislature did not put in. The practical effect of leaving this stock on the assessment roll is to subject the property of the corporation to double taxation.

In the language of Justice HOOKER in *Stroh* v. *City of Detroit, supra:*

"The Constitution does not permit the taxation of both property and shares, and we must, if possible, give such a construction to the law as to make it reconcilable with the Constitution."

The judgment is affirmed, with costs.

BROOKE and KUHN, JJ., concurred with MOORE, J.

OSTRANDER, C. J. It is settled by numerous decisions based upon reasoning which cannot be answered that the constitutional requirement of equal taxation, the ground for refusing double or duplicate taxation, has no application in cases where the alleged double or duplicate taxation is not imposed by the same sovereignty. The *Stroh Case* and the *Thrall Case* are applications of the rule forbidding—at least refusing to uphold—duplicate taxing of property in the same jurisdiction. In the case at bar, duplicate taxation is not attempted. What is attempted is the taxation of the shares of stock of a Michigan corporation, the owner

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of which is a resident of this State, some of the property of the corporation being within and some without the State. So much of the property of the corporation as lies within the State is taxed and presumably all of it lying without the State is taxed in the place where it is situated. It cannot be doubted that the shares of stock are property, nor can it be properly claimed that duplicate taxation is attempted.

The general power to tax the shares of stock to the resident owner being clear, the question to be determined is whether the taxing power is limited—whether they are exempt from taxation. The question must be answered as we shall read the statute. The language of the statute to be considered is in section 4002, subd. 7, 1 Comp. Laws 1915, and is:

"All shares in corporations organized under the laws of this State, when the property of such corporations is not exempt, or is not taxable to itself; or when the personal property is not taxed."

Unless exemption from taxation of these shares is found in this provision, they are not exempt. What is meant by the term "is not taxable to itself"? Does it mean not by the law of its organization, or other law, taxable to itself, or does it mean not in fact taxable to itself, as when some or all of it is situated outside the State. The legislature has not said "is not *taxed* to itself," but "is not *taxable* to itself." The property of the S. S. Kresge Company is *taxable* to itself. I cannot persuade myself that the legislature meant that the shares of stock of a Michigan corporation are taxable as the property of the company in the State varies and is actually taxed in the State. The statute deals generally with subjects of taxation. One subject is shares of the stock of Michigan corporations, which are not, however, to be taxed when the property of the corporation *is taxable to itself*. The context, I think, supports this view of the meaning of the par-

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ticular provision of the law. According to this view, the shares are not taxable.

STEERE, BROOKE, and STONE, JJ., concurred with OSTRANDER, C. J.

FELLOWS, J. (*dissenting*). I am unable to agree with Mr. Justice MOORE in the conclusion he has reached in this case and pursuant to the provision of the Constitution will state my reasons therefor.

The precise question in the form here presented has not been determined by this court, although the underlying principle has, as I view it, been settled by our adjudicated cases. In the case of *Graham* v. *Township of St. Joseph*, 67 Mich. 652, the plaintiff, a resident of defendant township, was the owner of, and assessed upon, certain shares of stock of an Illinois corporation operating a line of boats on Lake Michigan. The boats were also assessed in the same county in another township where they laid up for the winter. It was held that the boats were not *legally* taxable in Michigan, but were taxable at the *situs* of their owner, the Illinois corporation, but that plaintiff's stock was assessable to him. Surely if the corporate property was taxable in Illinois and the shares of stock representing the same were taxable in Michigan the case presented a case of double taxation as patent as does the instant case, if it is to be held that taxation by two different sovereigns is double taxation within the meaning of the constitutional inhibition.

In the case of *Bacon* v. *Board of State Tax Com'rs*, 126 Mich. 22, the relator, a resident of this State, was the owner of a number of shares of stock of the New York Central & Hudson River Railroad Company, a New York corporation. He was assessed upon such shares. The railroad company was assessed upon its property, all of which was then located outside the State. It was held that the assessment was valid, Mr.

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Justice LONG, speaking for the majority of the court, saying:

"One owning shares in a corporation is substantially the owner of an aliquot part of the property of the corporation, although the legal title to such property is vested in the corporation, and not in him. The value of his shares can never vary greatly from the value of the property they represent. This is as true of shares of stock in foreign corporations as of those in domestic corporations. The law taxes both, with the exception of cases where the property of the corporation is taxed in this State. Stated thus (and this is the effect of subdivisions 7 and 9, taken together), there is no want of uniformity of method or rule; and there is no impropriety in thus stating it, for the Constitution cannot be supposed to have been framed with a view to what other States might do."

The very vigorous dissenting opinion of Mr. Justice GRANT advances many arguments here advanced against the enforcement of the tax in the instant case. The case must be taken as holding that the taxation by different sovereigns of the same property represented in different forms, one sovereign taxing the property itself, and the other sovereign taxing the shares of stock representative of an interest in that property, is not double taxation.

In *Thrall* v. *Guiney*, 141 Mich. 392, the court had under consideration the following state of facts: Thrall, as administrator of the estate of one Taylor, held certain stock of a New Jersey corporation, a portion of whose tangible property was located in and was taxed in this State. The respondents board of assessors had assessed to the estate the value of the stock of such foreign corporation after deducting the value of the Michigan property. It was held to be undoubtedly true that there was no statutory provision for such deduction and that difficulties would arise in fixing values of such shares if such method were used, but it was said:

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"In the case before us there has been an assessment of the shares of relator, which he consents is a proper one if they are held to be assessable. We are of opinion that such shares were taxable, and, whatever difficulties may arise in other cases, that he cannot complain of the particular assessment made. There are many difficulties in the assessment of property under laws designed and framed, so far as general enactments can be framed, to insure recognition and operation of constitutional requirements. Courts must meet and deal with such matters as they arise. We are not here required to say more than that we find no reason to interfere with the assessment complained about."

In the case of *Stroh* v. *City of Detroit,* 131 Mich. 109, the stock assessed was that of a foreign corporation whose entire property was located in this State and here assessed to the corporation. The stock was assessable, within the strict letter of subdivision 9, of the section involved (section 4002, 1 Comp. Laws 1915), but to tax it would offend the superior mandate of the Constitution, and it was held that this court was justified in holding that the exception found in subdivision 7 applied to both foreign and domestic corporations. The statute as thus construed, was free from unconstitutional taint and did not work double taxation. But the double taxation there involved was a taxation of all the property of the corporation and the shares of stock which represented it by the same sovereign.

An examination of the record in the case of *Union Trust Co.* v. *Detroit Common Council,* 170 Mich. 692, discloses that the stock in Michigan corporations, there held by the relator and mentioned in the opinion, was stock in Michigan corporations all of whose property was located in Michigan, so that this court did not have before it the question presented in the instant case.

Turning now to the two Kentucky cases cited by Mr.

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Justice MOORE, those of *Commonwealth* v. *Walsh's Trustee*, 133 Ky. 103, and *Commonwealth* v. *Trust Co.*, 147 Ky. 77, it will be seen that the second of these cases follows the holding of the first one; each dealing, however, with different but similar provisions of the taxing law of that State. The first of these cases involved an assessment upon the stock in a public utility corporation, the Western Union Telegraph Company, held by a citizen and resident of that State. As to such corporations the statute of the State of Kentucky provided (section 4088, Kentucky Stat. 1915):

"The individual stockholders of the corporation which are, by this article, required to report and pay taxes upon the corporate franchise, shall not be required to list their shares in such companies so long as the corporations pay the taxes on the corporate property and franchises as herein provided."

And it was held that the Western Union Telegraph Company having fully complied with this provision of the statute, and paid its tax thereunder, the individual stockholders of that company were not required to list their stock for taxation. Tnis was but a following of the provision of the Kentucky statute. In the second of these cases the provisions of section 4085, Kentucky Stat. 1915, was involved. This section reads as follows:

"The property of all corporations, except where herein differently provided, shall be assessed in the name of the corporation in the same manner as that of a natural person, except that, when legally called on, the chief officer shall report a full statement of the property of such corporation for taxation, and, for a failure, shall be subject to the penalties in this article provided; and so long as said corporation pays the taxes on all its property of every kind, the individual stockholders shall not be required to list their shares in said corporation."

Following the former holding and construing this

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section, it was held that the individual stockholder was not required under this provision to list his stock for taxation. But these decisions are based on the provisions of the Kentucky statute which I have quoted.

The question of what constitutes double taxation, or as it is sometimes called duplicate taxation, has arisen not infrequently in the courts of last resort of the several States and that of the Nation. To properly consider each case, to differentiate and distinguish, or to harmonize them all, would require a treatise out of proportion to the function of a judicial opinion. Some of them will be found to have recognized greater power in the State than has this court, but with rare exceptions there will be found running through them the general tendency to which this court has adhered through the decisions to which I have called attention, and which tendency may be summarized in the statement that where the same property is twice taxed for the same purpose by the same government the taxation is double within the meaning of the constitutional requirement of uniformity in taxation; where the same property, although in different form, is twice taxed by different governments for different purposes it is not double or duplicate taxation within the constitutional provision. Thus it has never been seriously urged that property in a village may not be taxed by the State government for State purposes, the county government for county purposes, the township government for township purposes and the village government for village purposes. The same property and the same taxpayer respond in four instances to governmental demand for revenue, but the government in each case is different, the purpose in each case is different and the constitutional inhibition against duplicate taxation is not infringed.

The courts recognize with substantial unanimity that inequality in the burden that rests upon different

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classes of property must arise in our complex taxation systems, and that absolute equality and uniformity of taxation, dollar for dollar, upon each and all classes of property is a Utopia to be dreamed of but never attained. So, also, the courts recognize the right of one State to tax the property of a corporation at the *situs* of its owner, the corporation, and of another State to tax the shares of the corporation at the *situs* of their owner, the shareholder, without offending constitutional restraint. It may offend the ethics of the political economist but it does not infringe the fundamental law; as was said by Mr. Justice Holmes, writing for the court in *Kidd* v. *Alabama,* 188 U. S. 730:

"No doubt it would be a great advantage to the country and to the individual States if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided."

This was a case like the *Bacon Case.* The taxpayer, a citizen of the State of Alabama, was taxed upon shares of stock of a railroad located in another State. He insisted that his constitutional rights, under the 14th amendment, had been invaded. In this the court declined to sustain him. Mr. Justice Holmes further said:

"We say that the State in taxing stock may take into account the fact that the property and franchises of the corporation are untaxed, whereas in other cases they are taxed; and we say untaxed, because they are not taxed by the State in question. The real grievance in a case like the present is that, more than probably, they are taxed elsewhere. But with that the State of Alabama is not concerned."

In *Bradley* v. *Bauder,* 36 Ohio St. 28, the taxation of shares to a shareholder of the stock of the Western Union Telegraph Company, a small portion of whose property was within the State of Ohio, was in-

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volved. By far the major portion of the property of the telegraph company was taxed by other States. It was said by the court:

"The constitutional power to tax shares of stock, owned by our citizens in corporations located without the State, does not depend on whether the capital of the corporation is or is not taxed in the State where the corporation is created. The power is the same, whether the capital of the corporation is there taxed or not; otherwise, the power of taxation conferred by the constitution would be made to depend upon the operation of laws of a foreign jurisdiction—a proposition so obviously ill founded that the moment it is stated its falsity becomes apparent."

Later, in the case of *Hubbard* v. *Brush*, 61 Ohio St. 252, the same court had before it the question of the taxation of the shares of a West Virginia corporation whose business was located in Ohio, and it was held that unless all the corporate property was taxed in Ohio the shares were not exempt under a statute somewhat similar to our own. It is not necessary that we adopt in the instant case this doctrine in full, but the case is authority to the point, that unless the legislative intent to exempt a particular class of property from taxation is clear the property is taxable, a doctrine fully sustained in *Sturges* v. *Carter*, 114 U. S. 511, and other authorities to which we shall presently refer.

The supreme court of Iowa discusses the question of double taxation where the property of the corporation is assessed in another State, and it is sought to tax the shares to the owners thereof in Iowa, in the case of *Judy* v. *Beckwith*, 137 Iowa, 24. It was there said:

"In the first place, as we shall hereinafter see, the shares owned by the testator were not assessed in Illinois. But even if that point be waived, and it be conceded that the shares were in fact assessed in Illinois, it cannot be presumed, at least in the absence of a clearly expressed purpose to that effect, that the

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legislature undertook to relinquish in favor of another State its sovereign right to tax any and all property found within its jurisdiction. * * *

"It is urged, however, that even if the general rule be conceded to be as stated, still, where the effect of its application is to impose double taxation, the courts will refuse to apply it. Few will be disposed to deny that double taxation, within the proper meaning of that expression, is not favored in law. *Tallman* v. *Butler County*, 12 Iowa, 534; *National State Bank* v. *Young*, 25 Iowa, 311; *Faxton* v. *McCosh*, 12 Iowa, 527. But the trouble with the appellee's case is in the fact that the taxation which they are here resisting is not double within the rule to which they appeal. Each State is sovereign within its own territorial jurisdiction, and its power to tax any and all property therein, except such as is in actual transit through it, cannot be taken away, limited, or lessened by the act of the taxing authorities of any other State. (Citing authorities.) When a State finds property within its jurisdiction, it is not necessary, before taxing it, to investigate and ascertain whether any other State has already taxed it or asserts the right so to do; and if it happens that two or more jurisdictions have levied a tax upon the same item or description of property for the same period it is not double taxation within the condemnation of the law. A double taxation, obnoxious to the rule, is where the second or additional burden is imposed by the same sovereignty which imposed the first."

The rule was very tersely stated in *Wright* v. *Railroad Co.*, 195 U. S. 219:

"A tax in another State is no tax for the purposes of the State of Georgia."

In *City of San Francisco* v. *Fry*, 63 Cal. 470, the assessment was upon the shares of stock of a California corporation owning mining property in Nevada, upon which it there paid taxes assessed thereon. It was there said considering a statute similar to ours:

"This section only applies to corporations whose property is situate in this State. The legislature could

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pass no laws which would operate in the State of Nevada, and it could not be held as law that the legislature of California was engaging in its appropriate work of legislation with regard to property situate in another State."

The supreme court of the State of Louisiana, in considering the right of that State as against the claim of double taxation to tax property already taxed in another State, said:

"To abstain from taxing property because it has paid taxes to another sovereign, might be well enough in altruistic philosophy, but has no place in any revenue system based on sound principles. Taxation and legal protection must go together. If this property enjoys the benefit of the protection of the laws of this State it must, under sound principles of taxation, pay its just quota towards defraying the expense of the administration of those laws; and to let it off from the payment would be an invidious discrimination against the other property of the State which would then have to bear that much more than its just and equal share of the expense of the administration of the laws. By this prohibition our law-makers have not intended to make an excursion into the domain of sentiment but have intended that property taxed in a parish should not be taxed again in the same or in another parish for the same year; or, in other words, have intended to give statutory expression to the principle of equality and uniformity in taxation, a principle not abraded by taxing a second time property already taxed by another sovereign." *Griggsry Const. Co.* v. *Tax Collector,* 108 La. 435.

To the same effect will be found the following, among other cases: *Dyer* v. *Osborne,* 11 R. I. 321; *Ogden* v. *City of St. Joseph,* 90 Mo. 522; *Seward* v. *City of Rising Sun,* 79 Ind. 351; *City of San Francisco* v. *Flood,* 64 Cal. 504.

In view of the holdings of this court, and of the authorities which I have cited, and others which might be added, I am clearly of the opinion that there is no constitutional infirmity in taxing the shares of a cor-

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poration owned by a resident of this State, even though such corporation has paid taxes on its property in another State, and that the legislature, by the use in subdivision 7, of section 4002, 1 Comp. Laws 1915, of the words "or when the personal property is not taxed," had reference to and only to personal property not taxed in this State. The legislature was speaking on the subject of Michigan taxation and had no occasion to mention or take into consideration the taxation measures of any other State or sovereignty.

Nor am I able to follow counsel for defendant in his construction of section 31, of the "Denby act" so-called, being section 9562, 4 How. Stat. (2d Ed.); 2 Comp. Laws 1915, § 9046. This section is quoted by my Brother MOORE in his opinion. After providing for the taxation of the property of the corporation as other property is taxed, it is provided:

"Nothing herein contained shall authorize the taxing of the capital stock of such corporation as such capital stock."

My reasons for this are: *First*, That there is a difference and a marked one, between capital stock in the hands of the corporation and shares of stock in the hands of the shareholder; and, *second*, that we cannot presume that the legislature intended to exempt any species of property from taxation, that to exempt any species of property from taxation the legislative intent so to do must be clear.

While it is true that a shareholder in a corporation is substantially the owner of an aliquot part of the property of the corporation, and as such entitled to his share of the dividends, and upon its dissolution to his share of its assets, still the legal title to the property, its capital stock, is in the corporation, while the legal title to the share which he owns is in him. It was said by Mr. Justice Hughes, in the case of *Hawley* v. *City of Malden*, 232 U. S. 1:

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"While the shareholder's rights are those of a member of the corporation entitled to have the corporate enterprise conducted in accordance with its charter, they are still in the nature of contract rights or *choses in action.* 1 Morawetz on Corporations, § 225. As such, in the absence of legislation prescribing a different rule, they are appropriately related to the person of the owner, and, being held by him at his domicile, constitute property with respect to which he is under obligation to contribute to the support of the government whose protection he enjoys."

In *Allen* v. *Commonwealth,* 98 Va. 80, it was said by the court:

"The shares of stock held by the individual stockholder, as was said at the outset of this opinion, is something wholly distinct from the capital of the company, though it is true that all the shares taken together constitute the company and represent its franchises, capital and property."

The supreme court of North Carolina, in the case of *Board of Com'rs of Durham Co.* v. *Tobacco Co.,* 116 N. C. 441, very clearly pointed out the distinction between the "capital stock" of a corporation and its "shares." I quote the syllabus:

"'Capital stock' is a distinct subject of taxation from 'shares of capital stock,' the former representing the entire property, business, good-will, etc., of the corporation and belongs to it, while the latter belong to the individual stockholders and are taxable *ad valorem* like other property."

In the case of *Shelby County* v. *Planters' Bank,* 161 U. S. 149, the court had before it the inverse of the question here involved. The shares under the charter were assessable at the rate of one-half of one per cent. It was insisted and held by the court below that the capital stock in the hands of the corporation was thereby exempt. Mr. Justice Peckham, who wrote the opinion, takes up and considers those cases thought to

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sustain the views of the court below, distinguishes them from the case in hand, and in the course of the opinion reversing the case, says:

"We come to this conclusion because of the fact, well established by the decisions of this as well as many State courts, that there is a clear distinction between the capital stock of a corporation and the shares of stock of such corporation in the hands of its individual shareholders. So separate are these properties, and so distinct in their nature, that the taxation of the one property is not the taxation of the other."

See, also, *Atlanta Nat. Building & Loan Ass'n* v. *Stewart*, 109 Ga. 80; *Danville Banking & Trust Co.* v. *Parks*, 88 Ill. 170; *United States Electric Power & Light Co.* v. *State*, 79 Md. 63; *Street Railroad Co.* v. *Morrow*, 87 Tenn. 406; *Judy* v. *Beckwith*, *supra*. Some of these cases involve questions not now being considered and I cite them only as sustaining the proposition that there is a distinction between the capital stock of a corporation and its shares of stock in the hands of its stockholders.

The distinction is clearly pointed out in Ruling Case Law in the following language:

"Capital stock of a corporation is the fund, property, or other means contributed, or agreed to be contributed, by the shareholders as the financial basis for the prosecution of the business of the corporation, such contribution being made either directly through stock subscription, or indirectly through the declaration of stock dividends. * * * The tangible property of a corporation and the shares of stock therein are separate and distinct kinds of property and belong to different owners, the first being the property of the artificial person—the corporation—the latter the property of the individual owner." 7 R. C. L. pp. 195, 196.

When we examine the section under consideration, especially in view of the use of the words "as such capital stock," and we take into consideration that the capital stock of a corporation consists, not only of its

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tangible property, but also of good-will, franchise, trade marks and other intangible assets, the legislative intent to exempt the shares of stock in the hands of shareholders is wanting. The legislature was not considering in this section, the taxation of the individual shareholder, but was considering the taxation of the property of the corporation. This view, as I have already stated, is fortified by the rule, that the intent to exempt from taxation must clearly appear.

"It has been repeatedly held by this court that an exemption from taxation must be expressed in clear and unmistakable terms and cannot be shown by doubtful or ambiguous language." *Sturges* v. *Carter, supra.*

To the same effect will be found many of the cases already cited.

It is urged by counsel for the defendant that the administrative construction of the sections under consideration is as he contends, and that such administrative construction should be given due weight. I agree with counsel, that the administrative construction should be given due consideration by this court, but I do not agree with counsel that such construction is as contended. Indeed, I think it is in accordance with the claim of the plaintiff. Counsel cites us to an opinion rendered by Attorney General Oren to the board of State tax commissioners on March 19, 1900 (Rep. of Atty. Gen. 1900, p. 169), in which the attorney general states:

"If the property of a corporation is assessed to itself then the shares are not assessable to the individual holders thereof."

This was in accordance with the statute and the holdings of this court, but the attorney general was not then considering the question here involved. He had under consideration the question of whether section 8547, 3 Comp. Laws (3 Comp. Laws 1915, §

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11338), had been repealed by the general tax law of 1893. Later, and in 1902 (Rep. Atty. Gen. 1902, p. 125), the same attorney general had an analogous question to the one here involved before him. The Page Woven Wire Fence Company was a foreign corporation owning and paying taxes upon considerable property in this State. It also owned considerable property outside the State. The question involved was the proper method to be adopted in the assessment of the stock of this corporation. Attorney General Oren, in the course of an opinion to the board of State tax commissioners under date of April 16, 1902, said:

"As, under what has been said, both the shares of stock and property of the corporation in question cannot be subjected to taxation in this State, at the same time, unless in reaching the value of those shares of stock, a deduction be made of the property upon which taxes are paid within this State, the statutory provision providing for the taxation of shares in foreign corporations must, therefore, be construed so as to effect a constitutional rule of taxation, and unless it can be so construed, it would be unconstitutional to the extent that it requires, or permits, duplicate taxation, and thereby violates the constitutional rule of uniformity. In reaching the value of the shares of stock of the Page Woven Wire Fence Company, held in this State, for the purpose of taxation, allowance must be made for the value of the property upon which that company pays taxes in this State."

I am unable to find any opinion of that department in any way changing or modifying this holding. It fixes the departmental construction, has not been changed and is entitled to its due weight by this court.

The corporation has been taxed in the State of Michigan upon one-fifth of its personal property and it has been taxed in Michigan upon no more. Therefore, one-fifth of the value of the stock has responded to the taxing power of this State, and no more has so responded. The *situs* of the shares of stock is the *situs*

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of its owner, the defendant. Four-fifths of the personal property of the corporation has not been taxed in the State of Michigan, and four-fifths of the value of the stock has not responded to the taxing power of this State. It is said that there is no statutory authority for making the deduction of one-fifth the value; true, but the superior mandate of the Constitution must be taken into consideration, as was done in the *Stroh Case,* and when taken into consideration it exempts under the rule requiring uniformity of taxation that portion, and that portion only, of the property of the corporation which has been taxed within the State. The constitutional inhibition goes no further. We should give it its full force and so construe the statute as that it will square with the fundamental law. When we have done this the statute also must be given force, and the statute only purports to exempt the shares when the personal property of the corporation is taxed. When only a portion of the personal property is taxed the constitutional requirement is complied with when the portion taxed is deducted from the value of the stock. While this may be difficult in some instances it is far better that assessing officers be put to inconvenience, than that constitutional rights be invaded on the one hand, or that the State be deprived of its sources of revenue on the other. The course pursued in the instant case has the sanction of judicial authority. The inheritance tax laws of the different States (except under the amendment made by the State of Massachusetts) require the collection of a transfer tax upon stocks held by nonresidents in local corporations. There is, except as above stated, no specific provision permitting any deduction from their full value. In cases where the corporation owned property in more than one State there was no statutory provision permitting deductions which would limit the amount to that which the State might, under its

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power, and in justice, collect. But having regard for both the rights of the State under the Constitution and its statutory provisions as written, the States have been permited to collect, not the full amount fixed by the literal wording of the statute, but the full amount less the deduction required to be made by the limit of the power of the State. *Gardiner* v. *Carter*, 74 N. H. 507; *In re Cooley*, 186 N. Y. 220; *Matter of Thayer*, 193 N. Y. 430; *Kingsbury* v. *Chapin*, 196 Mass. 533. This method of levying inheritance taxes has long been in vogue in this State.

I am satisfied that the assessment was validly levied, that no constitutional or statutory rights of the defendant were invaded, and that the case should be reversed, with a new trial. Plaintiff should recover costs of this court.

BIRD, J., concurred with FELLOWS, J.

JONES *v.* STAINTON.

1. NAMES—FICTITIOUS NAMES—CONTRACTS—ENFORCIBILITY—STATUTES—RECORDING NAME.

   In an action for damages for the breach of a contract, which plaintiff signed binding himself individually, the objection that it is not enforceable because he was doing business under an assumed or fictitious name in violation of Act No. 101, Pub. Acts 1907 (2 Comp. Laws 1915, § 6349 *et seq.*), is without force, although in the introductory paragraph the contract described him as general manager; the undisputed evidence showing that he owned and managed the business.

2. CONTRACTS—MUTUALITY—RIGHT TO CANCEL.

   Where the contract did not provide, either expressly or inferentially, that plaintiff might cancel it at his pleasure by simply paying back the advance payment, it was not

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lacking in mutuality because providing for the return of the advance money if plaintiff failed to perform.

3. DAMAGES—BREACH OF CONTRACT—GUARANTY—PERFORMANCE.
Defendants, in an action for damages for breach of a contract for a Chautauqua Assembly, could not complain of the action of the trial court in limiting plaintiff's damages to $250, the amount of the guaranteed advance sale of tickets, on the ground that said guaranty anticipated performance, since said guaranty only emphasized defendants' obligation to pay the consideration inducing the opposite party to make the contract.

4. SAME—STIPULATED DAMAGES—PENALTY.
Nor can said amount be said to be so grossly in excess of possible or actual damages as to amount to a penalty; and it was proper, in view of all the circumstances, to treat it as the stipulated amount of liquidated damages in case of nonperformance by defendants.

Error to Van Buren; Des Voignes, J. Submitted October 11, 1917. (Docket No. 88.) Decided March 28, 1918.

Assumpsit by C. Durant Jones, doing business as the Jones Chautauqua System, against F. J. Stainton and others, as the Lawton, Michigan, Chautauqua Association, for breach of an entertainment contract. Judgment for plaintiff. Defendant brings error. Affirmed.

Thomas J. Cavanaugh, for appellants.

W. J. Barnard and *H. G. Giddings*, for appellee.

STEERE, J. Plaintiff recovered a verdict and judgment against defendants for breach of a written contract between the parties, dated October 17, 1913, providing for a Chautauqua entertainment, or assembly, to be furnished by him at the village of Lawton during the season of 1914, the material portions of which are as follows:

"This contract made this 17th day of October, 1913, by and between C. Durant Jones, general manager of the Jones Chautauqua System of the city of Perry,

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Iowa, party of the first part, and the Lawton, Michigan, Chautauqua Association of the city of Lawton, Michigan, party of the second part, witnesseth:

"The said party of the first part agrees to furnish a Chautauqua assembly for the term of six consecutive days during the Chautauqua season of 1914. It is agreed that the program shall consist of vocal and instrumental musical numbers, popular and prohibition lectures and other entertainments such as are usually found in Chautauqua programs and that there shall be a change of talent each day except Sunday.

"The party of the first part agrees to furnish talent, big tent, platform manager and assistant, and pay their expenses and to furnish the necessary advertising matter and tickets except local newspaper advertising. * * *

"The said parties of the second part agree to pay unto the party of the first part for the purpose of securing the Chautauqua assembly the sum of $250 as a guaranty. Twenty-five dollars of this amount shall be paid on the date of closing this contract and the remainder of $225 on the opening day of the assembly. It is further agreed that if the said party of the first part fails to furnish the Chautauqua assembly as agreed above the $25 advance payment is to be refunded to the said parties of the second part.

"And the said parties of the second part further agree that the advance sale of season tickets shall not fall below $250 which shall form the guaranty named above. * * *

"Said parties of the second part agree to push vigorously the sale of season tickets for the assembly, to furnish grounds conveniently located for the tent, without expense to the said party of the first part, advertise in local papers, to furnish lights, seats, platform and piano and piano accompanist for the musical numbers."

Plaintiff declared specially upon this contract with the common counts in assumpsit added.

Defendants pleaded the general issue, with special notices which present the defenses:

That the contract was procured by false representations as to the character of the talent which was to be furnished by plaintiff.

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That the contract was with a ficititous person, as plaintiff was doing business under the name of The General Chautauqua System of Perry, Iowa, without having complied with the provisions of Act No. 101 of the Public Acts of 1907 (2 Comp. Laws 1915, § 6349 *et seq.*).

That the contract was unilateral, not mutually binding between the parties and therefore unenforceable.

We see no force in the contention that the contract is not enforceable because plaintiff was doing business under an assumed or fictitious name in violation of the statute. While the contract in its introductory paragraph states that it is "By and between C. Durant Jones, General Manager of the Jones General Chautauqua System, of the city of Perry, Iowa, party of the first part, and the Lawton, Michigan, Chautauqua Association, of the city of Lawton, Michigan, party of the second part," it is signed by "C. Durant Jones, party of the first part" (by his authorized agent), and defendants, 13 in number, as parties of the second part, in their individual names and capacity. By its express terms C. Durant Jones, as party of the first part, is personally obligated in his own name on the one hand, and defendants in their individual names, as parties of the second part, are obligated on the other hand. It is undisputed that plaintiff is an actual person, of Perry, Iowa, and C. Durant Jones is his true name; that he both managed and owned the so-called Jones Chautauqua System, or business, in relation to which he contracted, and that C. B. Rayhill, his soliciting agent, was authorized to negotiate the contract and execute it for Jones and in the latter's name. The introductory designation in the contract of the parties of the first part and second part is merely descriptive.

Defendants' contention that the contract is unilateral and void for lack of mutuality is directed to the provision that "if the said party of the first part fails to furnish the Chautauqua Assembly as agreed above

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the $25 advance payment is to be refunded to said parties of the second part." It is urged that this reserves to the first party the right to abandon the contract at any time and refuse to furnish the assembly by simply returning the $25 which he had received from the second parties, while no mutual right to withdraw was reserved to the latter.

The contract contains numerous reciprocal promises to perform and respective undertakings of the contracting parties stated in detail, involving mutual assent, a consideration and the element of agreement. The $25 in advance was paid by defendants as agreed. There was part performance. The contract nowhere provides in express terms, nor inferably suggests, that plaintiff can thereafter cancel it at his pleasure by simply paying back the $25, unless it is to be read into his bare agreement to refund the advance payment if he fails to do as he otherwise contracted without qualification. It may be conceded as counsel contend that this stipulation is otherwise superfluous, for plaintiff would be obliged without it to return the money if he did not perform on his part, but he would be compelled to pay it to defendants because he breached the contract, as manifest minimum damages for such breach. The contract is in its form and provisions plainly bilateral and mutually obligatory; at most the agreement on plaintiff's part to pay back the advance payment is a lamely worded attempt to provide stipulated damages for breach of the contract by him.

Defendants' claim that the contract was procured by false representations as to the character of talent which was to be furnished is more particularly within the range of facts. It was solicited and procured by C. B. Rayhill who was in plaintiff's employ as agent to promote local Chautauqua associations and secure contracts with them for the so-called Jones Chautau-

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qua systems which plaintiff owned and managed. To that end he visited Lawton, in October, 1913, where he worked up sufficient interest and enthusiasm amongst certain of its citizens to effect a local organization to promote the project of an assembly and program of entertainment there for the following season, securing the contract in question. One or more meetings were held, officers were elected, including a secretary, treasurer and manager, and letter-heads of the association were printed. For manager Elder J. W. Pincombe was selected, who had taken a somewhat active interest in the matter and assisted Rayhill in securing the signatures of others to the contract. He states that "at his (Rayhill's) suggestion I was to act as secretary for the association." He later received from plaintiff letters, advertising matter, cuts, tickets, etc. He testified that he made efforts to secure ground to pitch a tent, which was arranged for early in the season, and tried to sell tickets, with what success he does not state, and that he delivered the cut sent him to the local paper, into which he thought some advertising matter went. He also eventually wrote the Jones Chautauqua system that it was desired the assembly be held between the 1st and 10th of August. The 5th of August was the time eventually designated. As to the alleged fraudulent representations, certain of defendants testified that when soliciting signatures Rayhill gave assurance the talent for the entertainments would be of a high class, telling one witness "as good as you would hear in Paw Paw," that it was the first appearance of the Jones people in Michigan and the price proposed was cheap because they planned to have assemblies in the nearby towns of Bangor, Decatur and Bloomingdale, with other promissory laudation of the proposed entertainments by which defendants were persuaded to sign the contracts.

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After Rayhill's departure in the fall of 1913, all active local interest and effort in the project was apparently confined to Elder Pincombe until after the Bangor assembly, which opened June 27, 1914, had been held. He visited Bangor on the last day of its Chautauqua and learned that plaintiff's program of entertainment was not satisfactory nor the assembly a success. He testified that he talked with the manager in charge who told him amongst other things, "this program should never have been sold to these towns," that he would write the Jones people about it, saying "and you do the same and see if some better program cannot be secured." On his return to Lawton a meeting of defendants was called where the matter was discussed, a letter was written to the Jones people commenting adversely on the Bangor program and dissatisfaction resulting, indicating defendants were not disposed to be sponsors for such an entertainment at Lawton, to which Jones replied at some length, admitting that certain days of that assembly were not a success, which he claimed was unavoidable owing to sickness and unexpected absence of certain of his better entertainers, necessitating substitutes, giving assurance that the deficiencies in talent had been remedied and they proposed to make good by putting on an entertainment at Lawton which would be worth "all the people pay for it and more too." After receipt of this letter counsel was consulted by defendants and a notice sent that the committee had not changed its attitude, declaring the contract at an end. On July 28th Jones wrote the secretary that every defect in the program had been eliminated, that the company had been strengthened by additional talent and they intended to make good at Lawton in every way.

In time before August 5th to erect the tent and make proper preparation plaintiff shipped a tent and other

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equipment for the assembly to Lawton, sending his platform manager and assistant manager there, but defendants declined to co-operate with or assist them in any way, objecting, as the assistant manager testified, to their going ahead or putting up their tent. They were followed by the entertainers, or so-called talent, in time for the opening, who remained during the balance of the appointed week, and the organization remained there ready to fulfil, with defendants' assistance, as was claimed, during the time arranged for under the contract. Jones testified, against defendants' objection, that the persons were regularly in his employ at so much per week, that he stood ready and offered to fully perform the contract on his part, and his total expenses of booking the town of Lawton, advertising, freight, fare and costs for the assembly week were $438.71, all of which he paid out.

The trial court held the contract between the parties bilateral and not revocable at the option of either party, that it was not made by Jones under an assumed or fictitious name in violation of the statute upon that subject.

The questions of fraudulent representation, compliance with the contract on plaintiff's part so far as permitted by defendants and tender of performance, were tried out as issues of fact and submitted to the jury with full instructions. Defendants made seasonable objections, motions, etc., to save all questions raised, and when the court held it a case for the jury upon the issues above indicated, propounded two special questions for their determination which, with their answers, are as follows:

"(1) Did the plaintiff tender to the defendants before he received notice of cancellation about July 16th, a program which consisted of vocal and instrumental musical numbers, popular and prohibition lectures and other entertainments such as are usually found in Chautauqua programs before the contract was renounced by the defendants?

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"Answer. Yes.

"(2) Did the plaintiff tender to and furnish the defendants at the village of Lawton a Chautauqua program consisting of vocal and instrumental musical numbers, popular and prohibition lectures and other entertainments such as are usually found in Chautauqua programs?

"Answer. Yes."

Although the court admitted evidence of plaintiff's expenses in preparing for and attempting to carry out the contract on his part "subject to instruction later on," defendants having objected "for reasons heretofore stated" and because "we are not responsible for any expenses after this contract was rescinded," in construing the contract and instructing the jury the court held that there could be no recovery beyond defendants' guaranty as specified in the agreement, which expressly provides that the "parties of the second part agree to pay unto the party of the first part for the purpose of securing the Chautauqua assembly the sum of two hundred and fifty dollars ($250) as a guarantee," directing the jury that if they found in favor of plaintiff upon the issues submitted to them he would be entitled to recover, and they should award him as damages that amount less the $25 previously paid.

It is contended for defendants that this was error because the provision quoted is directed to anticipated performance on both sides, as shown by a later provision that the second parties "further agree that the advance sale of season tickets shall not fall below $250 which shall form the guarantee above named," and it is said "there was no guaranty that defendants would pay any stipulated sum if they repudiated or renounced the contract, so that the plaintiff is relegated to its (his) remedy for a breach of the contract" to establish by his proofs as an issue of fact for the jury his damages under appropriate rules of

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law, in relation to which authorities are cited. With this view we are unable to concur. Undoubtedly it was anticipated there would be performance of all the mutual obligations assumed by the contract on both sides, but the express agreement by defendants to pay a specified sum of a certainty, as a manifest consideration and inducement for the opposite party to make the contract is only emphasized in view of the subject-matter and nature of the contract by the provision that selling season tickets for the entertainment to that amount will operate and be accepted as fulfillment of the guaranty, in further explanation of which the contract provides for a division of proceeds between the parties after plaintiff has realized a certain sum in excess of the $250. The word "guarantee" in the connection used is not a technical application and only signifies a warranty or unqualified and emphasized promise to pay. This is clearly of that class of contracts where the actual damages for a breach, or unlawful repudiation, even aside from gains prevented, are difficult to ascertain and uncertain in their nature. In *Crisdee* v. *Bolton,* 3 C. & P. 240, Best, C. J., said of liquidated damages in lieu of performance:

"I think that the parties to contracts, from knowing exactly their own situations and objects, can better appreciate the consequences of their failing to obtain those objects than either judges or juries. Whether a contract be under seal or not if it clearly states what shall be paid by the party who breaks it to the party to whose prejudice it is broken, the verdict in an action for the breach of it should be for the stipulated sum."

And our early case of *Jaquith* v. *Hudson,* 5 Mich. 123, 137 (cited in *Whiting* v. *Village of New Baltimore,* 127 Mich. 66), contains the settled rule thus clearly stated, Justice CHRISTIANCY speaking for the court:

"There are great numbers of cases, where, from the

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nature of the contract and the subject-matter of the stipulation, for the breach of which the sum is provided, it is apparent to the court that the actual damages for a breach are uncertain in their nature, difficult to be ascertained, or impossible to be estimated with certainty, by reference to any pecuniary standard, and where the parties themselves are more intimately acquainted with all the peculiar circumstances, and therefore better able to compute the actual or probable damages, than courts or juries, from any evidence which can be brought before them. In all such cases, the law permits the parties to ascertain for themselves, and to provide in the contract itself, the amount of the damages which shall be paid for the breach."

It cannot be said in view of the nature of this contract and the matter to which it relates that the sum unconditionally agreed to be paid "for the purpose of securing the Chautauqua assembly" is so grossly in excess of possible or actual damages as to lose sight of the element of compensation and stand purely as a penalty. As evidenced by the entire agreement, in the light of the circumstances under which it was made as disclosed by the testimony, the provision in question is to be construed to have intended the stipulated amount to be as liquidated damages in case of nonperformance by defendants.

While numerous assignments of error not directly reviewed here are launched against the rulings of the court during the progress of the trial and charge to the jury, they are for the most part, in essentials, contingent upon and disposed of by the controlling questions of law which have been discussed and passed upon, or by the answer to special questions and verdict of the jury. Though not reviewed in detail they have been considered and the conclusion reached that they present no prejudicial errors demanding reversal.

The judgment is affirmed.

OSTRANDER, C. J., and BIRD, MOORE, BROOKE, FELLOWS, STONE, and KUHN, JJ., concurred.

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ADULTERY—See WITNESSES (1-3).

ADVERSE POSSESSION.

1. A right to lay a drain and convey surface water upon the lands of another, beginning in favor, was permissive, and no rights by adverse user could arise thereunder. *Voorhies* v. *Pratt*, 91.

2. Where the permissive user was extinguished by sale of the premises, and thereafter defendant claimed the right to maintain the drain, and the evidence shows that he

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ADVERSE POSSESSION—Continued.

did so maintain it, going upon the premises and keeping it open, for over 16 years, *held*, a right by prescription was made out. *Id.*

3. In an action to restrain a township highway commissioner from removing certain fences enclosing part of the highway claimed to be owned by plaintiff by adverse possession, evidence *held*, insufficient to establish title by adverse possession. *Mendel* v. *Poland*, 571.

4. It is no longer possible in Michigan to obtain title by adverse possession against the public. Act No. 46, Pub. Acts 1907 (3 Comp. Laws 1915, § 12311). *Id.*

5. Where one seeks to obtain lands against the public by adverse possession of a part of a highway or street, the possession should be of such character, and under such circumstances, as to warrant the conclusion that the municipal authorities must be held chargeable with notice of the adverse possession and with acquiescence therein; and in order that the occupancy may ripen into a title it is necessary that all the elements be clearly established, that is, the possession must be actual, continuous, visible, notorious, distinct and hostile to that of the public. *Id.*

6. Where the original owner of the land testified that he intended to give two rods as his share of the highway, and he thought he placed the fence upon the proper line, and no claim was made by him or his successors in title to any property belonging to the highway, which the fences enclosed, plaintiff and her predecessors had only a permissive occupancy of the highway occupied by them, which ceased when the public, through its proper officers, demanded the use of the entire highway. *Id.*

AGENCY—See PRINCIPAL AND AGENT.

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AMENDMENTS.

Where the declaration alleged that the fraudulent representations relied upon were made at the lots, while the proofs disclosed that they were made in plaintiff's office, plaintiff's motion to amend the declaration to correspond with the proofs should have been allowed; the variance being unimportant to the gist of the fraud. *State Security & Realty Co.* v. *Badger*, 105.

AMOUNT OF COMPENSATION—See MASTER AND SERVANT (7, 9, 31, 32).

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ANSWER—See MANDAMUS (2).

APPEAL AND ERROR.

1. Where the issue as to defendant's liability was determined by the jury in favor of the plaintiff, and it recovered only the contract price, the admissibility of certain evidence, which appears to be of no consequence, will not be considered, on review. *E. P. Stacy & Sons* v. *Moher*, 82.

2. Assignments of error relating to the introduction of evidence, which, even if inadmissible, was harmless, will not be reviewed by the Supreme Court. *Edison Illuminating Co.* v. *Misch*, 115.

3. Assignments of error not argued in the Supreme Court will not be considered. *Bilakos* v. *Kelley*, 125.

4. Where there was no request to charge on the question of sufficiency of tender in the justice's court, and nothing in the record to show that the attention of the trial court was directed to the question, it is not before the Supreme Court for review, although discussed in counsel's brief. *Gleason* v. *Stone*, 188.

5. Where it was conceded upon a former trial that the accident occurred in a residence street, such admission was conclusive upon plaintiff on the second trial. *Johnston* v. *Cornelius*, 210.

6. Assignments of error not discussed in counsel's brief must be deemed to be waived and abandoned. Supreme Court Rule No. 40. *Ward* v. *Carey*, 217.

7. Where one of the plaintiffs had already testified that he was present when defendant took the car, and did not protest, it was not prejudicial error to exclude further evidence of the fact. *Id.* 218.

8. The question as to plaintiffs' failure to file their certificate of copartnership, as required by the statute, cannot be raised for the first time by defendant upon motion for a new trial. *Id.*

9. Assignments of error upon the admission and rejection of testimony which did not affect the controlling question, will not be reviewed in the appellate court. *Thomas* v. *Bush*, 224.

10. The right to an appeal is and always has been statutory, and does not exist at common law, but is a remedy which the legislature may, in its discretion, grant or take away, and it may prescribe in what cases, and under what circumstances, and from what courts, appeals may be taken; and unless the statute expressly or by plain implication provides for an appeal from a judgment of a court of inferior jurisdiction, none can be taken. *J. F. Hartz Co.* v. *Lukaszcewski*, 230.

11. Jurisdiction cannot be conferred by consent or inadvertence. *Id.*

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APPEAL AND ERROR—Continued.

12. The statutory right of appeal is but a mere privilege, not amounting to a vested right, and may be taken away by the legislature before appellate proceedings have been instituted, although judgment was rendered before the statute was amended. *Id.*

13. Under Act No. 172, Pub. Acts 1917, amending the judicature act (3 Comp. Laws 1915, § 13736), providing that "Writs of error, upon a final judgment or determination, where the judgment exceeds in amount $500, may issue of course, out of the Supreme Court, in vacation as well as in term, and shall be returnable to the same court; and in all other cases such writ may issue in the discretion of the Supreme Court upon proper application," an action begun in justice's court, limited in amount to $500 by plaintiff's declaration and the jurisdiction of the court, and where judgment of "no cause of action" was entered in the circuit, before the statute was amended, and a writ of error was sued out in this court, after said act went into effect, without any application to this court therefor, the Supreme Court is without jurisdiction and will, of its own motion, dismiss the case. *Id.*

14. The right of appeal is statutory, and unless taken within the time fixed by the statute the appellate court does not acquire jurisdiction. *Bolton* v. *Cummings*, 234.

15. Jurisdiction is not acquired by waiver or consent. *Id.*

16. Where a writ of error was not taken out until after the expiration of a year from the rendition of judgment, and no motion for extension of time was made, and no extension was granted by the Supreme Court or by any of the Justices thereof, the Supreme Court should, of its own motion, dismiss the case for want of jurisdiction. 3 Comp. Laws 1915, § 13741. *Id.*

17. Language of the trial court, which, if used in the presence of the jury, would have been open to serious objection, *held*, not prejudicial where the jury were not present when it was spoken. *Van Driel* v. *Stevens*, 291.

18. The defense of *ultra vires* is not available unless specially pleaded. *Duluth, etc., R. Co.* v. *Wilson*, 314.

19. Exceptions to the charge on a theory of defense which might well have been disregarded by the trial court for lack of proof, will not be reviewed by the appellate court. *Schneider* v. *C. H. Little Co.*, 361.

20. Where the instruction of the court on the defendant's theory of the case was correct so far as it went, the failure of the court to give more specific instructions was not reversible error, in the absence of a request therefor. *Id.* 362.

21. The charge of the court should be taken as a whole; error cannot be predicated upon isolated portions. *Id.*

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APPEAL AND ERROR—Continued.

22. In an action for fraud, commenced by writ of attachment, where the judgment of no cause of action is sustained by the appellate court, it will be unnecessary to review the action of the court below in dissolving the writ of attachment. *Woodward* v. *Huron Implement Co.*, 523.

23. The rejection in the court below of testimony of plaintiff's misconduct, offered in support of defendants' theory that plaintiff voluntarily surrendered possession of the premises, in an action for damages for unlawful eviction, cannot be objected to for the first time in this court on the ground that such testimony was admissible in mitigation of damages. *Gallant* v. *Miles*, 532.

24. Where the court below would have been justified in directing a verdict for plaintiff, there was no error of which defendant could complain in submitting the question to the jury. *Id.*

25. When the court below properly directed a verdict for defendant, the judgment will be affirmed by the appellate court although for a different reason. *Fulton* v. *Mohr*, 538.

26. Where, after the court's suggestion that defendant offer additional proofs to perfect the record was not acted upon by counsel, a verdict was directed against him, it cannot be contended in the appellate court that defendant was stopped by the court from offering additional testimony considered by him to be material. *Moore* v. *Harneck*, 642.

See CUSTOMS AND USAGES; DEPOSITIONS; DRAINS; EQUITY (2); EVIDENCE (9, 10); MANDAMUS; MASTER AND SERVANT (8, 16, 29, 30, 41-43); MUNICIPAL CORPORATIONS (9); NEW TRIAL (6); RAILROADS (2, 3); TRIAL; WITNESSES (2).

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AUDIBLE WARNING—See AUTOMOBILES (3).

AUTHORITY OF PARTNER—See CONVERSION (2).

AUTOMOBILES.

1. Actionable negligence must be proved in order to recover for the death of a pedestrian accidentally killed on a public street by one violating the provisions of Act No. 33, Pub. Acts 1909 (3 Comp. Laws 1915, § 15431), prohibiting, under penalty, the unauthorized taking or using of automobiles, notwithstanding the provisions of section 14577, 3 Comp. Laws 1915, permitting recovery for the death of a person under circumstances amounting in law to a felony, since it does not create a cause of action where there is no causal connection between the death and the felony. *Johnston* v. *Cornelius*, 209.

2. Act No. 33, Pub. Acts 1909, prohibiting the unauthorized taking or using of automobiles, does not of itself give a right of action to pedestrians injured upon the street; they not belonging to the class for whose protection the law was passed. *Id.* 210.

3. The driver of an automobile who approached a pedestrian in the street on a dark and rainy night owed a duty of giving reasonable warning of his approach, and this duty was not discharged by the presence of lights on his machine, since subdivision 1, § 6, Act No. 318, Pub. Acts 1909 (1 Comp. Laws 1915, § 4812), requires an automobile to have "a suitable and adequate bell, horn or other device," for the purpose of "signaling." *Id.*

4. In an action for the death of plaintiff's decedent, caused by his being struck by defendant's truck, where the evidence showed that decedent, in the middle of a block of a narrow street, suddenly stepped from behind another car where he could not be seen, and proceeded diagonally across the street with his back toward the direction from which vehicles would come, with his coat collar turned up and his head down, without looking, and apparently so engrossed in thought that he failed to hear either the noise of the truck or the shout of warning, and was hit by the truck, he was guilty of contributory negligence as a matter of law, barring recovery. *Fulton* v. *Mohr*, 538.

5. Where decedent was guilty of contributory negligence as a matter of law, barring recovery, the fact that defendant's chauffeur was unlicensed becomes immaterial. *Id.*

See CONVERSION (2-6); EVIDENCE (6, 10); NEGLIGENCE (3); TRIAL (11).

BANKRUPTCY—See SCHOOLS AND SCHOOL DISTRICTS (4).

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BROKERS.

In an action by a real estate broker for commissions on the leasing of land, where the undisputed testimony showed that the terms of the contract, which was in writing as required by section 11981, 3 Comp. Laws 1915, had not been met by the plaintiff, the court below properly directed a verdict in favor of defendant, and such action is not open to the objection that plaintiff was thereby deprived of a trial by jury. *Fleming* v. *James S. Holden Co.*, 519.

See FRAUD (8, 12, 13, 15).

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BURDEN OF PROOF—See SPECIFIC PERFORMANCE (2).

CANCELLATION OF INSTRUMENTS.

In proceedings in the court of equity by the guardians of a man over 75 years of age, suffering with *senile dementia*, to set aside a contract made by him with defendants for his board and lodging for the rest of his natural life, on the ground of his mental incompetency at the time the contract was made, evidence examined, and *held*, sufficient to sustain the finding of mental incompetency. *Aull* v. *Peterson*, 99.

CARRIERS.

In an action for personal injuries by a passenger against a street car company, evidence that there was, as a result of a collision, a violent impact and crash, and by reason thereof plaintiff was thrown to the floor of the car, justified the finding of the jury that plaintiff suffered a physical shock, resulting in extreme nervousness and hysteria, which was due to the collision and not merely to fright. *Goldman* v. *Detroit United Ry.*, 543.

See DEPOSITIONS; EVIDENCE (8, 9); INTERSTATE COMMERCE; RAILROADS.

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CONSPIRACY—See FRAUD (12).

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CONSTITUTIONAL LAW.

1. Although section 1, art. 1, of the Constitution of Michigan, declares the State has jurisdiction over the territory embraced within its boundaries, described therein, land ceded by Act No. 17, Pub. Acts 1881, to the United States for St. Mary's Falls ship canal, lying within said boundaries, reserving to the State only the right to serve process in civil and criminal actions, is not subject to the operation of the State workmen's compensation act, passed in 1912 (Act No. 10, Extra Session 1912, 2 Comp. Laws 1915, § 5423). *Willis* v. *Oscar Daniels Co.*, 20.

2. Under section 13, art. 7, Const. Mich. 1909, the legislature is given plenary authority to prescribe the powers and duties of the probate courts and the judges thereof. *In re Merrill*, 244.

3. Subdivision 2, section 13765, 3 Comp. Laws 1915, empowering probate judges to issue a warrant and imprison any person who shall refuse or neglect to comply with any order issued by said court, is not in contravention of the 14th Amendment to the Constitution of the United States; said orders being made only after due notice and hearing, it cannot be contended that it is not due process of law. *Id.*

4. Where petitioner in habeas corpus proceedings wilfully refused to comply with an order of the probate court to pay over money coming into his hands as executor of an estate, and the warrant of commitment was issued under section 13765 to enforce said order, it was not an imprisonment for debt in contravention of section 20, art. 2, Const. Mich. 1909. *Id.*

See HIGHWAYS AND STREETS (1); MUNICIPAL CORPORATIONS (5).

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CONTRACTS.

1. An executory contract between a railway company and a telegraph company to jointly construct, maintain, and operate a telegraph line along the railroad right of way for a term of years, was not necessarily personal in its character and could, consistent with the rights of the

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CONTRACTS—Continued.

telegraph company, be assigned by the railway company to its successor and be by it specifically enforced. *Detroit, Toledo & Ironton R. Co.* v. *Western Union Tel. Co.*, 2.

2. Where plaintiff went into possession of the railway property, which was sold under foreclosure proceedings in the Federal court, and began to operate it with the aid of the telegraphic system, promptly electing to be bound by the terms of said contract, there was no lack of mutuality, although the Federal court gave plaintiff 90 days in which to disavow any contract of its predecessor. *Id.*

3. It would be inequitable to permit defendant to terminate said contract on the ground of lack of mutuality because of the insolvency of plaintiff's predecessor, and its passing into the hands of a receiver, where said question was not raised during the six years of the receivership, and not until after the mutuality had been restored by the substitution of a responsible party. *Id.* 3.

4. Where the decree of the Federal court contemplated that the interest of the mortgagee, the receiver, and the railway company should pass to the purchaser, and in pursuance thereof the transfers were executed by the master in chancery, the receiver, and the mortgagor railway company, the rights of said railway company in said contract which had passed to the receiver, were transferred to plaintiff, and are enforceable by a court of equity. *Id.*

5. There are no questions of public policy involved which would affect the right of a customs broker to make an assignment of the fees to be received therefor; the duties being of a private nature. *Duluth, etc., R. Co.* v. *Wilson*, 313.

6. In view of the general rule that all the time and labor of an employee belongs to his employer during the hours of service, and that the master is entitled to the earnings of the servant earned outside his employment during such hours, an express contract to that effect is valid and enforceable. *Id.*

7. A contract between a railroad company and a clerk employed in its freight office, by which said clerk agreed to remit to the company all fees received by him as a customs broker, in consideration of his receiving a fixed salary, he acting in such capacity for the purpose of facilitating the company's freight service, *held*, not void as against public policy. *Id.* 314.

8. If said contract be considered an assignment, *held*, not within the exception made in the salaries of public officers and certain fiduciary officers, and therefore valid. *Id.*

9. The doctrine of *ultra vires* cannot be applied to contracts not prohibited, either expressly or by necessary implication, in the statute. *Id.*

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CONTRACTS—Continued.

10. Where a contract has been fully performed on the one side, and no question of public policy is involved, the other party is estopped from setting up the defense of *ultra vires*. *Id.*

11. Where a railroad company entered into a contract with a clerk employed in its freight office whereby said clerk was to act as a customs broker for the purpose of facilitating its freight service, and he in return for a fixed salary, which was increased from time to time, agreed to remit the fees received by him as such broker to the railroad company, and the company performed its part of the contract for six years, and until the termination of the employment, defendant is estopped from claiming that the contract was *ultra vires*, in an action to recover part of the fees not remitted in accordance with said contract. *Id.*

12. A contract must be construed so as to effectuate the intent of the parties when it was made, therefore it should be construed in the light of the circumstances existing at the time it was made. *Ardis* v. *Grand Rapids, etc., R. Co.*, 400.

13. A contract drawn by one of the parties is subject to the rule of construction that it is to be construed most strongly against the party who is responsible for the language used. *Id.*

14. A party to a contract will be held to that meaning which he knew the other party to the contract supposed the words to bear. *Id.*

15. In proceedings for an accounting under the terms of a written contract whereby a lumber company advanced money to a railroad company for the construction of a spur track, which was to be returned to it from the earnings of such spur, *held*, that if there was any ambiguity in the contract it was made clear by a letter written to plaintiff by defendant's superintendent subsequent to the making of the contract accepting the construction placed upon it by plaintiff. *Id.* 401.

16. Where an offer by the heirs of a deceased partner to sell deceased's interest in the partnership business to the surviving partner was accepted conditional upon defendant's verifying certain figures, and nothing further was done, the minds of the parties never met, and no valid, binding contract was made. *Lee* v. *Hedenskoog*, 427.

17. In proceedings by a contractor to enforce a mechanic's lien, where the evidence shows that there was no reasonably unsatisfactory work performed by the contractor, *held*, that the architect's refusal to issue certificate for payment for work done, in accordance with the terms of the contract, was captious, unreasonable, and arbitrary, justifying plaintiff in quitting the job. *Kunze* v. *Jones*, 453.

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CONTRACTS—Continued.

18. An owner, or architect, as agent of the owner, may not stand by day after day, and see the work on a building go on without objection, and then, after the work is completed, reject it as unsatisfactory. *Id.*

19. One who takes a contract under the original contract, and is to perform in accordance with the original contract, is a subcontractor, and, in order to recover under the statutory bond, he must comply with the statute in giving the proper notice. Section 2, Act No. 187, Pub. Acts 1905 (3 Comp. Laws 1915, § 14828). *People* v. *Valley Mantel & Tile Co.*, 554.

20. That one furnished materials for the erection of a public building in conformity with the original contract would not make him a subcontractor if he was ignorant of the terms of the original contract and did not agree that it should be the standard; one cannot become a subcontractor unless he contracts to become such. *Id.*

21. Where the contract did not provide, either expressly or inferentially, that plaintiff might cancel it at his pleasure by simply paying back the advance payment, it was not lacking in mutuality because providing for the return of the advance money if plaintiff failed to perform. *Jones* v. *Stainton*, 694.

See APPEAL AND ERROR (18); CANCELLATION OF INSTRUMENTS; CONVERSION (5); DAMAGES (3); ESTATES OF DECEDENTS (5, 6); EVIDENCE (7); EXECUTORS AND ADMINISTRATORS (1, 2); FRAUD (1, 2, 9, 14); NAMES; SPECIFIC PERFORMANCE (3); TRIAL (9); VENDOR AND PURCHASER (5).

CONTRIBUTORY NEGLIGENCE—See AUTOMOBILES (4, 5); EVIDENCE (12); NEGLIGENCE (3); STREET RAILWAYS (1, 3); TRIAL (3).

CONTROL OF STREETS—See MUNICIPAL CORPORATIONS (5, 7).

CONVERSATION BY TELEPHONE—See EVIDENCE (3, 5, 6).

CONVERSION.

1. In an action for the conversion of a marine engine, placed in a boat on which defendant had a chattel mortgage, after the giving of the mortgage, which did not cover after-acquired property, where plaintiff's demand for the engine was refused although it could have been removed without damage to the boat, and defendant sold and bid in the boat and engine, and the testimony is undisputed that title to the latter was retained in plaintiff, a verdict for plaintiff was properly directed by the court below. *Boudeman* v. *Arnold*, 162.

2. Where plaintiffs, in an action for the conversion of an automobile sold to them as part of the property of a garage business, of which they claimed to have been put in possession by the vendors, copartners, which fact was

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CONVERSION—Continued.

in dispute, a receipt for part of the purchase price, signed in the firm name by one of the partners, in the presence of the other, who received the money, was admissible as proof of the transaction, and was not open to the objection that there was no evidence that the signer was authorized to sign the firm name. *Ward* v. *Carey*, 217.

3. Under plaintiffs' theory of the case that there had been a completed sale, it was competent for them to show their acts of dominion over the property after the sale, and also to show that after defendant took the car they made a demand on him for it, and what conversation was had between the parties on that occasion. *Id.*

4. Where a witness testified that he was in the business of selling automobiles; that he had handled cars for eleven years; that he was the agent for the same make of car, and was engaged in selling them; that he had seen and driven the car in question, he was qualified to testify as to its value, and the price at which it was sold. *Id.*

5. The exclusion of testimony as to the ownership of the lease, attempted to be developed by defendant on cross-examination, for the purpose of showing a rescission of the contract of sale to plaintiffs by the vendors, and a subsequent sale of the automobile to defendant, for the reason that the vendors were unable to transfer the lease, was not error, since their inability to perform would not entitle them to rescind, nor release them from their obligation to perform. *Id.*

6. The court below was not in error in refusing to direct a verdict for defendant on the ground that he was a *bona fide* purchaser of the automobile, since his belief that his vendor was the true owner could not defeat recovery by the true owner. *Id.* 218.

CONVEYANCES—See HUSBAND AND WIFE (2).

CORPORATE ACT—See CORPORATIONS (2).

CORPORATE STOCK—See TAXATION (2, 3).

CORPORATIONS.

1. Where, on appeal by minority stockholders from a decree of the court below, granting the dissolution of a mining corporation, under sections 13563, 13577, 3 Comp. Laws 1915, it appears that it is a solvent, prosperous, going concern with a large cash surplus, and it does not appear to be the intention to discontinue the business of mining and distribute its assets among the stockholders, but the effect would be that a holding corporation would acquire, by force of dissolution, the stock of the minority stockholders, which it was unable to acquire by purchase in the open market, the decree of the court below will be reversed. *Paine* v. *Saulsbury*, 58.

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CORPORATIONS—Continued.

2. The act of covering money deposited with a corporation as security for the performance of a contract into the general fund of the corporation was a corporate act for which the individual directors were not liable, and in an action against them to recover the money so deposited, the corporation in the meantime having become insolvent, a verdict was properly directed in favor of defendants. *Wilcox* v. *Gauntlett*, 272.

See CONTRACTS (9); TAXATION (2, 3).

CORRESPONDENCE—See ESTATES OF DECEDENTS (6).

CORROBORATIVE TESTIMONY — See ESTATES OF DECEDENTS (6).

COURSE OF EMPLOYMENT—See MASTER AND SERVANT (18-21, 26).

COURT RULES—See EXCEPTIONS, BILL OF; MANDAMUS (3).

COURTS—See TRIAL (5, 6).

CRIMINAL LAW.

1. The intent required to make one punishable under the statutes against carrying concealed weapons, is an intent to do the act prohibited, viz., to carry weapons concealed upon the person; the ultimate purpose being immaterial. *People* v. *Williamson*, 342.

2. In a prosecution for carrying concealed weapons under Act No. 274, Pub. Acts 1911, as amended (3 Comp. Laws 1915, § 15236), where the court, in his charge to the jury, repeatedly called their attention to the question of concealment, asking, "Did the defendant have the gun on his person concealed as stated by the people's witnesses?" it is not open to the objection that the court did not sufficiently define the offense charged, since concealment implies an assent of mind and purpose. *Id.*

3. The authorities are agreed that a revolver or pistol need not be loaded to come within the statute. *Id.* 343.

See INDICTMENT AND INFORMATION; MUNICIPAL CORPORATIONS (3, 8); RECEIVING STOLEN GOODS.

CROSSING ACCIDENTS—See STREET RAILWAYS.

CUMULATIVE EVIDENCE—See NEW TRIAL (2).

CUSTODY OF CHILD—See HABEAS CORPUS (2, 3).

CUSTOMS AND USAGES.

Evidence of consignee's custom with reference to securing from the carrier notations of shortages upon freight bills, in the absence of evidence showing that defendant knew of such custom, while inadmissible, was harmless error. *Oceana Canning Co.* v. *King*, 269.

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CUSTOMS BROKER—See CONTRACTS (5, 11).

DAMAGES.

1. Where the judgment of the court below included damages not authorized under the pleading, *held*, affirmed for the amount of payments, taxes and interest conditioned upon plaintiffs' acceptance within 20 days. *Cox* v. *Holkeboer*, 86.

2. Where there was no question that decedent owed the debt for the payment of which the money was paid to defendant, when decedent ascertained that the debt had not been paid, it was his duty, instead of entering into litigation to avoid its payment, to pay it, and thus make his damages as small as practicable, and the judgment in his favor should have been limited to the amount paid, with interest. *Cutter* v. *Powers*, 376.

3. Defendants, in an action for damages for breach of a contract for a Chautauqua Assembly, could not complain of the action of the trial court in limiting plaintiff's damages to $250, the amount of the guaranteed advance sale of tickets, on the ground that said guaranty anticipated performance, since said guaranty only emphasized defendants' obligation to pay the consideration inducing the opposite party to make the contract. *Jones* v. *Stainton*, 695.

4. Nor can said amount be said to be so grossly in excess of possible or actual damages as to amount to a penalty; and it was proper, in view of all the circumstances, to treat it as the stipulated amount of liquidated damages in case of nonperformance by defendants. *Id.*

See CARRIERS; CONVERSION (4); EMINENT DOMAIN (1, 2); EVIDENCE (1); FRAUD (4, 5); HUSBAND AND WIFE (1); MASTER AND SERVANT (23); VENDOR AND PURCHASER (2, 4).

DEALERS—See FOOD.

DEATH—See AUTOMOBILES (4); MASTER AND SERVANT (2, 9, 16, 25); NEGLIGENCE (3); TRIAL (11).

DEBTOR AND CREDITOR—See PLEDGES.

DECAYED EGGS—See FOOD (2).

DEEDS.

Where it is undisputed that a deed of a farm from a wife to her husband was executed and delivered by her, and was in his possession at the time of her death, the court below properly held that there was a valid delivery, as a matter of law, although there was some question as to whether the deed was entitled to record by reason of the fact that it was acknowledged and witnessed over the telephone. *Jennings* v. *Reeson*, 559.

See EJECTMENT; WILLS.

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DEFENSES—See APPEAL AND ERROR (8); FOOD (3); HIGHWAYS AND STREETS (7); MALICIOUS PROSECUTION (3).

DEFINITION—See MASTER AND SERVANT (12).

DELIVERY—See DEEDS; SALES (2, 3).

DEMAND—See CONVERSION (3); SUBROGATION (6).

DEMURRAGE—See RAILROADS (1, 3).

DEMURRER—See EXECUTORS AND ADMINISTRATORS (4).

DE NOVO—See EQUITY (2).

DEPOSITIONS.

The card containing the sealed record on arrival of the train at Chicago, part of the official records of the defendant, offered in evidence by defendant and identified by a witness on deposition, who, after identifying it, stated its contents, should have been admitted in evidence, although the card was not attached to the deposition, where no objection was made at the time the deposition was taken. *Oceana Canning Co.* v. *King*, 269.

DESCRIPTION—See VENDOR AND PURCHASER (7).

DEVISES—See WILLS.

DIRECTED VERDICT—See APPEAL AND ERROR (24, 25); BROKERS; CONVERSION (1, 6); CORPORATIONS (2); MALICIOUS PROSECUTION (2, 4, 5); NEGLIGENCE (2); RAILROADS (1); REPLEVIN (1); SALES (3); STREET RAILWAYS (1, 3); TRIAL (3, 5, 6, 10, 11).

DISABILITY—See MASTER AND SERVANT (31, 32).

DISAFFIRMANCE—See FRAUD (14).

DISCOVERED DANGER—See STREET RAILWAYS (2).

DISCRETION OF COURT—See DIVORCE (1); NEW TRIAL (9, 11).

DISMISSAL AND NONSUIT.

Act No. 200, Pub. Acts 1915, 3 Comp. Laws 1915, § 14566, providing that whenever the defendant in any civil action shall have entered upon his defense in open court, the plaintiff shall not be allowed to discontinue or submit to nonsuit without defendant's consent, construed, and *held*, to be the legislative intent that the act was not to affect the common law right of a plaintiff to submit to a nonsuit at any time before a verdict is rendered in a case where no witnesses were procured, no defense made on the facts, and only legal questions were raised, but was to apply where defendant had been to the expense and trouble of procuring witnesses, and had entered upon his defense in open court upon the merits. *Mintz* v. *Soule*, 9.

DISSOLUTION—See CORPORATIONS (1).

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DIVORCE.

1. Where a wife filed a bill asking for separate maintenance, defendant filing an answer in the nature of a cross-bill asking for a decree of divorce, and a decree was entered providing for separate maintenance and ordering defendant to pay plaintiff $5 a week; and about a year later defendant moved to modify the decree by granting an absolute divorce and reducing the amount of alimony, in view of the record before this court, settled by agreement, showing that defendant admits his adulterous conduct charged in the original bill, and that he is in default in the payment of alimony, neither the best interests of the parties nor any consideration of public policy requiring the exercise by the court of its discretion to grant an absolute decree, and, the amount of alimony being reasonable, the order of the court below denying the motion will be affirmed. *Dreijer* v. *Dreijer*, 619.

2. On appeal from a decree dismissing the husband's bill for divorce, evidence on the part of plaintiff that defendant's constant nagging, scolding, and fault-finding rendered it impossible for them to live together, although plaintiff was not entirely without fault, *held*, sufficient to make out a case of extreme cruelty requiring reversal of the decree of the court below and one entered granting divorce. *Northrup* v. *Northrup*, 623.

DIVORCED WIFE—See WITNESSES.

DOMESTIC CORPORATIONS—See TAXATION (2, 3).

DOUBLE TAXATION—See TAXATION (1, 2).

DRAINS.

1. The finding of special commissioners of the necessity of establishing a drain upon private property, and the compensation therefor, under section 4883, 1 Comp. Laws 1915, is final, in the absence of fraud. *Wabash Railway Co.* v. *Ottgen*, 437.

2. Where, on appeal from a decree dismissing plaintiff's bill to enjoin the establishment of a drain along plaintiff's right of way, under section 4894, 1 Comp. Laws 1915, the evidence shows that a drain had previously been maintained on plaintiff's right of way, and to place it elsewhere would be more expensive, and there is no evidence of fraud, either actual or constructive, on the part of the special commissioners, the decree below will be affirmed. *Id.*

See ADVERSE POSSESSION (1, 2).

DUE PROCESS OF LAW—See CONSTITUTIONAL LAW (3).

DUTY TO MINIMIZE DAMAGES—See DAMAGES (2).

EASEMENTS—See HIGHWAYS AND STREETS (8).

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EJECTMENT.

In ejectment proceedings, where plaintiff claimed title under a deed from his wife, testimony as to another deed, executed at the same time, from the husband to the wife, of another parcel of land, was properly rejected as immaterial. *Jennings* v. *Reeson*, 559.

ELECTION—See ESTOPPEL.

ELECTION OF REMEDIES—See MASTER AND SERVANT (6, 10).

ELECTIONS.

Section 53 of the charter of the city of Lansing, providing that "No member of the city council shall, during the period for which he was elected, be elected or appointed to, or be competent to hold, any office or position or receive any employment directly or indirectly connected with the city government," construed, and *held*, to be the intent to prevent the holding of two offices by one man at the same time, and the holding by one man of a second office during the period of the term of his first office, and not to disqualify aldermen from succeeding themselves or from being elected to the office of mayor or city treasurer for the term succeeding their terms as aldermen. *People, ex rel. Brown*, v. *Parsons*, 39.

ELIGIBILITY OF CANDIDATES—See ELECTIONS.

EMBEZZLEMENT—See INDICTMENT AND INFORMATION.

EMINENT DOMAIN.

1. It is the general rule that the tribunal whose duty it is to determine the value of land taken by eminent domain is not limited to the value of the land or the purpose for which it is actually used, but may consider all uses to which it is adapted and might be put, and will award compensation upon the basis of its most advantageous use. *Chicago, etc., R. Co.* v. *Simons*, 76.

2. An award of compensation based upon the value of the land for farming purposes, although within the range of the testimony, will be set aside by the Supreme Court as inadequate, where the uncontroverted testimony on the part of respondents showed that the value of the land for subdividing and platting purposes was much in excess of what it was worth for farming. *Id.*

3. As to the power of the Supreme Court to set aside the award on the ground of intemperate argument of counsel to the jury,—*quære*. *Id.*

EMPLOYMENT—See MASTER AND SERVANT (31, 32).

EQUITY.

1. An allowance of $12 per week for the board and lodging of an incompetent person, and $68 for other services ren-

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EQUITY—Continued.

dered him during a period of 68 weeks, under conditions which were somewhat trying because of his mental condition and filthy habits, *held*, not excessive. *Aull* v. *Peterson*, 99.

2. On appeal in equity proceedings, the appellate court considers the case *de novo*, and where, after considering all the advantages of the trial judge, and the presumptions arising from the personal touch he had with the case, it is satisfied that an incorrect result has been reached, whether as a matter of law or fact, its duty to reverse the court below is clear. *Barker* v. *Finley*, 166.

3. Where plaintiff in his bill prayed that a will, under which he obtained title to land, be sustained as to the validity of his title, but otherwise be set aside, his position was inconsistent; he cannot elect to accept what is favorable to him and at the same time reject it for other purposes. *Young* v. *Young*, 236.

4. There being no privity between plaintiff and defendant in respect to the cause of action, the fact that plaintiff is precluded by his own acts in proceeding against the vendee of the land affords no argument for the propriety of his inconsistent claims in this proceeding. *Id.*

5. The proceeding, being for an accounting, was properly brought in equity. *Ardis* v. *Grand Rapids, etc., R. Co.*, 401.

6. On a bill by the heirs of a deceased partner against the surviving partner praying for an accounting, that a certain contract to purchase plaintiffs' interest be decreed to be a valid and binding obligation upon defendant, and for the appointment of a receiver, where, from counsel's statement at the hearing, it was made clear that all that plaintiffs sought was a money decree, the court of equity had no jurisdiction, and plaintiffs should have been remitted to their action at law. *Lee* v. *Hedenskoog*, 427.

7. The rule that, having jurisdiction for one purpose, a court of equity may, and usually will, retain jurisdiction to settle the entire controversy, has no application in cases where equitable jurisdiction is not made out by the bill itself. *Allen* v. *Heft*, 593.

See CANCELLATION OF INSTRUMENTS; CONTRACTS (3, 4, 10); CORPORATIONS (1); EXECUTION (2); EXECUTORS AND ADMINISTRATORS (3); LIMITATION OF ACTIONS (2); MUNICIPAL CORPORATIONS (2, 16); SPECIFIC PERFORMANCE; SUBROGATION.

EQUITY PRACTICE—See LIMITATION OF ACTIONS (2).

ESTABLISHMENT—See DRAINS.

ESTATES BY ENTIRETIES—See HUSBAND AND WIFE (2).

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ESTATES OF DECEDENTS.

1. While it is the settled law of Michigan that services performed by a child for a parent are presumptively performed gratuitously, the presumption may be rebutted by evidence that both parent and child acted upon the understanding that the services were to be paid for. *In re Teller's Estate*, 181.

2. In an action by a son against the estate of his mother for services performed under an arrangement with her that he was to be paid out of the estate, evidence *held*, sufficient to raise a question of fact for the jury. *Id.*

3. A receipt from the son to the mother expressing a nominal consideration "in full of all demands, accounts, actions, or causes of action whatsoever, to and including this date," is not a settlement conclusively binding upon claimant, where the evidence shows that a similar contemplated receipt to be signed by the mother was not signed, that there was no going over of accounts, or a determination of balances, or a payment of any money by either to the other. *Id.*

4. Where there was testimony that the mother stated that the receipt was given to her for the purpose of defrauding claimant's wife, but claimant's participation in the fraud, if any, was not conclusively shown, the trial court was not in error in refusing to direct a verdict on the ground that claimant was estopped to dispute the receipt on the ground of fraud; but the court's refusal to submit the question to the jury, as he was requested by appropriate requests to do, constituted reversible error. *Id.* 182.

5. On appeal to the circuit court by the administrator from the allowance of a claim against decedent's estate for the amount of a loan claimed to have been made by plaintiff to decedent at the time decedent purchased some land, evidence of the vendor of the land that plaintiff gave him a check in the presence of the deceased, although not at his request, is not open to the objection that it does not tend to show contractual relations between plaintiff and deceased, but, with other evidence, was properly admitted as evidence of the payment. *In re Davis' Estate*, 500.

6. Where disinterested witnesses testified that deceased admitted his indebtedness to plaintiff and stated he had given him a heifer and a hog in payment of the interest, letters from deceased to plaintiff referring to the same subject were properly admitted in evidence. *Id.*

See CONTRACTS (16); EXECUTORS AND ADMINISTRATORS.

ESTOPPEL.

Where plaintiff, more than two years after learning of his rights under a second will, deeded land with full covenants of warranty, basing his right to convey under the first will, his action was an election amounting to an equitable estoppel. *Young* v. *Young*, 236.

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ESTOPPEL—Continued.

See CONTRACTS (3, 10, 18); EQUITY (4); ESTATES OF DECEDENTS (4); FRAUD (9); TRIAL (9).

EVIDENCE.

1. Mortality tables were admissible in evidence, in a personal injury case, where plaintiff was permanently injured by the loss of two fingers, impairing his earning capacity. *Bilakos* v. *Kelley*, 125.

2. City directories were not competent to prove who constituted defendant copartnership at the time plaintiff received his injury, several years before the trial. *Id.*

3. A telephone conversation is admissible in evidence, where the identity of the person communicated with by telephone is established. *Theisen* v. *Detroit Taxicab & Transfer Co.*, 136.

4. The court will take judicial notice of the fact that a modern invention, such as the telephone, is a necessity in the conduct of business especially in the large cities. *Id.*

5. Where two parties are subscribers to the same telephone exchange, and one party, using the telephone directory to ascertain the number of the other party, calls for such other party, and is connected by central with such other party, and a conversation ensues in which the party called responds and informs the party calling that he is the party called, *held*, sufficient to raise a rebuttable presumption or inference to make a *prima facie* case of identity. *Id.*

6. In an action for damages to plaintiff's automobile caused by a collision with a taxicab, evidence of a telephone conversation by plaintiff's son with a person in defendant's office who said he was its manager, that the taxicab belonged to defendant, and that the driver had reported the accident, *held*, admissible for the purpose of identifying the owner of the taxicab. *Id.*

7. A promise made in bad faith, with no intent to carry it out, and as a part of a scheme to defraud, may be received in evidence because it is connected with representations of fact, and its nonperformance may be proven; but, standing alone, statements promissory in their character are contractual in their nature and do not constitute fraud. *Barker* v. *Finley*, 166.

8. In an action against a railroad company by the assignee of a claim of the consignee for a shortage of goods, testimony by an agent of the consignee as to what the teamster told him about the number of cases he hauled from the car to the warehouse was inadmissible as hearsay. *Oceana Canning Co.* v. *King*, 268.

9. In view of positive testimony to the effect that the car was delivered to the consignee with the seals unbroken, and the only testimony of the shortage exclusive of the hear-

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EVIDENCE—Continued.

say testimony of the teamster, was a notation made upon the freight bill by defendant's agent without an investigation, it cannot be said that the objectionable testimony does not constitute reversible error. *Id.*

10. In an action against the owner of an automobile for damages caused by a collision with a motorcycle on a public highway, where witnesses were permitted to testify as to what was said by the driver and the occupants of the automobile, a few minutes after the accident occurred, in the nature of admission of responsibility for the accident, where, independent of said testimony, plaintiff had sustained his theory of the case by a clear preponderance of the evidence, its admission, even if erroneous, *held*, not prejudicial. *Link* v. *Fahey*, 308.

11. Conclusions of a witness, even an expert, as to what an ordinarily prudent man would have seen are inadmissible. *Schneider* v. *C. H. Little Co.*, 362.

12. In an action for personal injuries received by plaintiff by reason of the giving way of a floor on which defendant's agent had negligently piled a great quantity of plaster, testimony of plaintiff that the presence of the plaster on the floor did not cause him any thought of danger was admissible, it being a fact, and not a conclusion, bearing upon the contributory negligence of plaintiff, since, if there was danger which he fully appreciated, he might have been guilty of contributory negligence. *Id.*

13. The third party not being present when the money in question was paid to defendant, and what occurred then and there being the crucial and vital question in the case, the court might have excluded his testimony as irrelevant and immaterial. *Cutter* v. *Powers*, 376.

14. An admission of counsel at the hearing that the title shown by an abstract was not marketable is not one which would bind the court, since the question is one of law. *Bradway* v. *Miller*, 648.

15. The recital in a sheriff's deed that a mortgage contains a power of sale is no evidence of that fact. *Id.* 649.

See ADVERSE POSSESSION (3); APPEAL AND ERROR (1, 2, 7, 9, 23, 26); CONVERSION; CUSTOMS AND USAGES; DEPOSITIONS; DIVORCE (2); EJECTMENT; EMINENT DOMAIN (2); ESTATES OF DECEDENTS (5); FIRES; FRAUD (8, 10, 12, 13); FRAUDS, STATUTE OF; HIGHWAYS AND STREETS (6); INDICTMENT AND INFORMATION; MALICIOUS PROSECUTION (2, 4, 5); MASTER AND SERVANT (8, 17, 22, 28, 36, 37); MUNICIPAL CORPORATIONS (15); NEGLIGENCE; NEW TRIAL (3, 5, 7, 10); PRINCIPAL AND AGENT (1); REPLEVIN (2); SCHOOLS AND SCHOOL DISTRICTS (1); SPECIFIC PERFORMANCE (1); STREET RAILWAYS; TRIAL (1-8, 12, 14, 18); WITNESSES.

EXCEPTIONS—See MASTER AND SERVANT (42); NEW TRIAL (6).

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EXCEPTIONS, BILL OF.

1. An order of the Supreme Court extending the return day of the writ of error, is no authority for the circuit judge to disregard the correct practice pursuant to section 62, chap. 18, of the judicature act (3 Comp. Laws 1915, § 12634), and Circuit Court Rule No. 66, in settling a bill of exceptions after expiration of the time limited in the statute. *Yerkes* v. *Antrim Circuit Judge*, 443.

2. Where the practice as prescribed in section 62, chap. 18, of the judicature act, and Circuit Court Rule No. 66, has not been followed, the circuit judge is without jurisdiction to settle a bill of exceptions, after expiration of the time limited in the statute, since he may exercise discretion only within the statutory limitations. *Id.* 444.

3. A motion to enter judgment *non obstante veredicto*, if treated as a motion for a new trial, must conform to the practice prescribed in the statute (section 62, chap. 18) and Circuit Court Rule No. 48, in order to entitle plaintiff to extension of time to settle a bill of exceptions. *Id.*

4. Because a writ of error may issue any time within one year after the entry of judgment, it does not follow that a bill of exceptions can likewise be settled as a matter of right within that time, unless the statute and rules providing for extending the time for settling such bill shall have been complied with. 3 Comp. Laws 1915, § 12634; Circuit Court Rule No. 66. *Id.*

EXCESSIVE PENALTY—See MUNICIPAL CORPORATIONS (3).

EXCHANGE OF PROPERTY—See SPECIFIC PERFORMANCE (2).

EXECUTION.

1. Mandamus will not lie to compel a circuit judge to grant a stay of execution issued on a judgment rendered on November 2d, where the bond was not filed till December 5th following; section 23, chap. 22, of the judicature act (Act No. 314, Pub. Acts 1915, 3 Comp. Laws 1915, § 12812), requiring such bond to be filed within 20 days after the judgment is rendered. *Hatch* v. *Washtenaw Circuit Judge*, 1.

2. On appeal from a decree dismissing a bill by a wife to restrain the sheriff from selling an automobile levied on by a judgment creditor of the husband, where the ownership of the automobile is in dispute, plaintiff claiming that in its purchase the husband acted as her agent, and the conclusions that the automobile is necessary for her use in selling her farm products, and that the identical automobile is the only thing that will satisfy her just demands not being apparent from the bill of complaint or that her remedy at law is inadequate, the sheriff not being officially insolvent, the decree of the court below will be modified to the extent of dismissing the bill without prejudice to plaintiff's right to institute a suit at law. *Allen* v. *Heft*, 594.

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EXECUTORS AND ADMINISTRATORS.

1. The presumption that services rendered to a mother by a daughter are gratuitous is not of itself destroyed by the fact that they were not members of the same household, yet this fact weakens the presumption, and it may be regarded as giving support to other facts tending to establish an implied contract. *In re Hoffman's Estate*, 464.

2. Evidence that plaintiff, a married woman living in her own home in the same city as her father and mother, in response to her mother's request, gave up her own home to care for her mother, who promised her, in her father's presence, that she should never regret it, presented a question for the jury as to whether there was an implied promise to pay for the services so rendered. *Id.*

3. On a bill by the administrator and the heirs of a deceased insane person against the wife and children of a former guardian, to enable the administrator to marshal the assets of the estate, which involves an intricate and complex accounting covering a long period of years, and there is no proceeding in which the administrator can obtain the relief sought other than by an equity proceeding, the court of equity has jurisdiction. *Elwell* v. *Pierce*, 479.

4. On cross-appeals from an order sustaining demurrers to the bill and cross-bills, in view of the complexity of the questions raised, and of the fact that from the pleadings it is impossible for the appellate court to decide them, the demurrers will be overruled and the case remanded to the court below for hearing upon the merits upon proper pleadings. *Id.*

See ESTATES OF DECEDENTS (5); INDICTMENT AND INFORMATION; SUBROGATION (2).

EXEMPTIONS—See TAXATION (3).

EXPERT TESTIMONY—See EVIDENCE (11).

EXPERT WITNESSES—See FIRES (2).

EXTENSION OF EXISTING SEWER—See MUNICIPAL CORPORATIONS (11).

EXTENSION OF TIME—See EXCEPTIONS, BILL OF; VENDOR AND PURCHASER (1).

EXTINGUISHMENT—See MASTER AND SERVANT (6).

EXTREME CRUELTY—See DIVORCE (2).

FACT—See EVIDENCE (6).

FAILURE OF VENDOR'S TITLE—See VENDOR AND PURCHASER (2).

FEDERAL CONSTITUTION—See CONSTITUTIONAL LAW (3).

FEDERAL EMPLOYERS' LIABILITY ACT—See INTERSTATE COMMERCE; MASTER AND SERVANT (1, 47).

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FEE—See HIGHWAYS AND STREETS (3).

FEES—See CONTRACTS (5).

FELONY—See AUTOMOBILES (1).

FICTITIOUS NAMES—See APPEAL AND ERROR (8); NAMES.

FINANCIAL CONDITION—See TRIAL (4).

FINDING OF COURT—See FRAUD (10); SUBROGATION (1).

FINDING OF JURY—See PRINCIPAL AND AGENT (2).

FINDINGS OF INDUSTRIAL ACCIDENT BOARD—See MASTER AND SERVANT (8, 16, 17, 29, 36).

FIRES.

1. In an action against a railroad company for setting fire to plaintiff's premises by escaping sparks from a locomotive, where the declaration alleged that defendant's track ran so near plaintiff's property that it was possible for sparks to be carried from the engine, properly stating a cause of action, testimony tending to support the inference of improper equipment and operation, from the circumstance of the great distance it was assumed the spark was thrown, was not inadmissible on the ground of variance; the proof offered should have occasioned no surprise to defendant. *Budd* v. *Ann Arbor R. Co.*, 250.

2. In such action, testimony of two witnesses, formerly locomotive engineers, although neither had operated an engine for many years, that a properly equipped engine could not throw sparks the distance traveled in the case at bar, was admissible, its weight being for the jury. *Id.*

3. Testimony of witnesses that, while working upon a barn, they had noticed live sparks fall upon the roof, carried a distance of from 150 to 200 feet farther from the track than the barn that was burned, was admissible for the purpose of showing that it was physically possible for sparks to be carried that distance through the air, but not for the purpose of showing that defendant's engines generally caused fires at other times and places. *Id.* 251.

See TRIAL (14).

FIRM NAME—See APPEAL AND ERROR (8).

FITNESS—See FOOD (1).

FIXTURES—See REPLEVIN (1).

FOOD.

1. There is no implied warranty of fitness or quality in the sale of articles of food, between dealers, where the buyer has an opportunity to inspect the articles before delivery. *E. P. Stacy & Sons* v. *Moher*, 81.

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FOOD—Continued.

2. Where defendant, a retail grocer, purchased of a wholesale dealer a quantity of eggs for future delivery, under written contract, accepting the stock in the condition it was in when it went into cold storage, in an action for the purchase price, the court properly instructed the jury that if, when the goods went into cold storage, they were fit for food and they afterwards deteriorated and became unfit for food, the loss would be on defendant, there being no claim of fraud or misunderstanding in making the contract. *Id.*

3. Where the eggs were sound when defendant purchased them, and they decomposed after being placed in cold storage, section 6473, 2 Comp. Laws 1915, making it a misdemeanor to have in one's possession, with intent to sell, any article of food which is diseased, decomposed, etc., is no defense to an action for the purchase price. *Id.* 82.

FORCIBLE ENTRY AND DETAINER.

A landlord who obtained entry by means of fraud, and was followed by officers, who, by false representations as to the writ of restitution, and with a display of force calculated to intimidate and terrify, but without actual violence, took plaintiff's goods from the premises, was liable for damages for forcible entry under section 13229, 3 Comp. Laws 1915, although the tenancy had been terminated by proper notice. *Gallant* v. *Miles*, 532.

FORECLOSURE—See EVIDENCE (15); MORTGAGES; REPLEVIN (1, 2); VENDOR AND PURCHASER (6).

FORFEITURE—See VENDOR AND PURCHASER (1, 2).

FRANCHISES—See HIGHWAYS AND STREETS (5, 8).

FRAUD.

1. A vendee who has been defrauded in the purchase of land and desires to rescind, must act promptly and place the vendor *in statu quo*; or offer to do so. *Cox* v. *Holkeboer*, 86.

2. Where plaintiffs, claiming fraud in the sale of land to them on contract, moved off the premises, informing defendant why they had done so, offering to surrender the premises and contract, and demanding a return of the money paid, clearly indicating their intention to rescind, they did all they were required to do as a condition precedent to bringing suit; the contract being unrecorded no reconveyance was necessary. *Id.*

3. If further acts upon the part of plaintiffs had been necessary, in order to restore the *status quo*, defendant was in no position to insist upon them, after refusing to acquiesce in the rescission and informing plaintiffs that "he would fight them to the last ditch." *Id.*

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FRAUD—Continued.

4. Plaintiffs were entitled to recover as damages the payments and taxes paid, with interest thereon, but not the rental value of the premises. *Id.*

5. Special damages not having been pleaded, no recovery could be had for loss of wages or the expenses of moving onto the premises. *Id.*

6. Act No. 238, Pub. Acts 1913 (8 Comp. Laws 1915, § 11981), declaring void all agreements to pay commission for the sale of real estate unless in writing, is not applicable to relieve defendant from liability for the fraudulent representations of his agent in the sale of land. *Id.*

7. In an action for fraud in the sale of lots, a statement by the vendor that the "improvements had all been paid for except the paving" was a material statement of fact, which, if relied upon by plaintiff and untrue, entitled it to a verdict. *State Security & Realty Co.* v. *Badger*, 104.

8. Where the representation of fraud relied upon by plaintiff was testified to by its president, the president's son, and the broker who made the sale, and was denied by defendant only, a verdict for plaintiff cannot be said to be against the weight of the evidence. *Id.* 105.

9. It is a well understood rule, based upon general principles of public policy, that courts will not extricate parties from a situation in which, by their own acts, they have placed themselves in perpetrating, or attempting to perpetrate, a fraud on others; that, if fraudulent contracts are executed, courts may not be appealed to to work a restoration of the property, and, if executory, they will not lend their aid to work an enforcement. *In re Teller's Estate*, 181.

10. In an action for fraud in the transfer of plaintiff's business, evidence examined, and *held*, that the findings of the court below were not against the clear weight of the evidence requiring a reversal of the judgment under section 12587, 3 Comp. Laws 1915. *Woodward* v. *Huron Implement Co.*, 523.

11. Representations in the sale of a rooming house business and furniture as to the income and respectability of the place, if false, were material. *Williamson* v. *Hannan*, 658.

12. In an action by the buyer against the broker, his agent and the owner of a rooming house business for fraud in the sale of same, evidence examined, and *held*, insufficient to sustain the allegation that the representation that the neighborhood was respectable was false, that the broker's agent represented, as a fact, the income, and that the owner and broker's agent were in confederation to deceive plaintiff. *Id.*

13. In the absence of evidence that defendant broker's agent had any knowledge of the reputation or character of any

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FRAUD—Continued.

of the roomers of a rooming house, his silence on that subject, and as to whether they would remain in the house for any length of time, was no evidence of fraudulent design on his part, in making a sale of the business. *Id.*

14. In an action for damages for fraud and deceit in the sale of a rooming house business, it is immaterial, as affecting the cause of action, whether plaintiff did or did not disaffirm the contract, hence the action of the court below in submitting that question to the jury, limiting the damages to the amount paid, with interest, was not reversible error. *Id.*

15. In such action, the broker and his agent being joint defendants with the owner, requested instructions that the broker and his agent could not be held liable unless the statements made by the agent were known by him to be false and were made with intent to deceive and defraud, should have been given. *Id.* 659.

See AMENDMENTS; APPEAL AND ERROR (22); DRAINS; ESTATES OF DECEDENTS (4); EVIDENCE (7); FOOD (2); FORCIBLE ENTRY AND DETAINER; TRIAL (1, 2).

FRAUDS, STATUTE OF.

1. Written contracts may be modified by subsequent oral agreement, if otherwise valid. *Grand Traverse Fruit & Produce Exchange* v. *Thomas Canning Co.*, 95.

2. Testimony of a subsequent oral agreement which worked a release or discharge of the whole contract obligation was admissible, although the amount involved was more than $50. *Id.*

3. Testimony, in an action for the purchase price of certain cherries, that plaintiff and defendant entered into an oral contract reducing the number of cars of cherries to be furnished under a written contract from 45 to 22½, that when 15 cars had been delivered plaintiff requested defendant to go into the open market and buy the remaining 7½ cars and charge the difference in price to it, which was done, and a bill for the difference was presented by defendant and allowed as a set-off against plaintiff's claim, *held*, sufficient to sustain a finding by the jury that the parties settled on the basis of 22½ cars. *Id.*

FREIGHT—See EVIDENCE (8).

FRIGHT—See CARRIERS.

GAS RATES—See MUNICIPAL CORPORATIONS (3, 4, 7, 8).

GIFTS—See SUBROGATION (1).

GIST OF ACTION—See AMENDMENTS.

GIST OF OFFENSE—See CRIMINAL LAW.

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"GOOD CAUSE SHOWN"—See MASTER AND SERVANT (42, 43).

GOOD FAITH—See MALICIOUS PROSECUTION (3).

GREAT WEIGHT OF EVIDENCE—See NEW TRIAL (1, 3, 5, 7, 8).

GROSS NEGLIGENCE—See STREET RAILWAYS (2).

GUARANTY—See DAMAGES (3).

GUILTY KNOWLEDGE—See RECEIVING STOLEN GOODS (4).

HABEAS CORPUS.

1. The words of the statute (subdivision 2, § 13765, 3 Comp. Laws 1915) providing for the arrest and imprisonment of "any person" is broad enough to include executors, and petitioner's contention that the warrant of commitment is illegal and void because in violation of section 12819, 3 Comp. Laws 1915, cannot be sustained. *In re Merrill*, 244.

2. A final adjudication on a writ of habeas corpus, brought to determine the right of a parent or guardian to the care and custody of a child, conclusively determines all questions necessarily involved as between the same parties and upon the same state of facts, but is no bar to a later proceeding under changed conditions. *Martin* v. *Benzie Circuit Judge*, 549.

3. Mandamus will issue to compel the court below to grant a hearing upon the merits of a petition for a writ of habeas corpus by a father for the custody of his child, although a previous adjudication was against him, where the petition alleged that conditions had materially changed since the former proceedings. *Id.*

See CONSTITUTIONAL LAW (4).

HARMLESS ERROR—See APPEAL AND ERROR (2, 17).

HEARSAY—See EVIDENCE (8, 10, 13).

HERNIA—See MASTER AND SERVANT (27).

HIGHWAYS AND STREETS.

1. Under section 28, art. 8, Const. 1909, the right is reserved to all cities, villages and townships to the reasonable control of their streets, alleys, and public places. *Edison Illuminating Co.* v. *Misch*, 114.

2. The title of a municipality in streets and alleys is such as to enable the public authorities to devote them to public purposes. *Id.*

3. While the abutting owner of a public alley has the right of ingress and egress to and from his lot, and a possibility of reverter, the fee is in the municipality in trust for the public. Section 3351, 1 Comp. Laws 1915. *Id.*

4. A street or alley is not for the purposes of passage and travel merely, but for all the uses to which they are

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HIGHWAYS AND STREETS—Continued.

usually devoted, as the wants or conveniences of the public may render necessary or important. *Id.*

5. A contractor who, in excavating for the erection of a building on a lot abutting on a public alley, excavates into the alley and damages the mains and conduits of a public service corporation, placed therein under its franchise granted by a city ordinance, does so at his peril; its rights in said occupancy being entitled to protection by him. *Id.*

6. Evidence of the existence of manholes in the alley in the vicinity of the excavation belonging to plaintiff and other corporations, indicating the existence of the underground structures, *held*, sufficient at least to warrant the submission to the jury of the question of sufficiency to put defendant upon notice of their presence. *Id.*

7. While a city might waive a provision in the franchise of a public service corporation, placed therein for the protection of the city, requiring it to obtain a permit from the proper city authorities before placing its mains or conduits in a public street or alley, the failure of the corporation to obtain such permit is no defense to an action by it for damages to them by a private contractor while excavating in an alley preparatory to erecting a building. *Id.*

8. The right of a public service corporation, under its franchise, to lay mains and conduits in a public alley, constituted a continuing easement with which defendant had no right to interfere. *Id.* 115.

See ADVERSE POSSESSION (3-6); MUNICIPAL CORPORATIONS (5-7); NEGLIGENCE (3).

HOLDING OUT BY PRINCIPAL—See PRINCIPAL AND AGENT.

HOME RULE CHARTERS—See MUNICIPAL CORPORATIONS (9).

HUSBAND AND WIFE.

1. The mere fact that a husband and wife are not, for a period, on friendly terms, is no excuse for an outsider to interfere in their domestic relations, although the real injury he may do may be less than where happy family relations are destroyed. *Hendrickson* v. *Harry*, 41.

2. An assignment of a contract interest in land, held by a husband and wife by the entireties, signed by the husband alone, is void. *Zeigen* v. *Roiser*, 328.

See EXECUTION (2); WITNESSES.

IDENTITY—See EVIDENCE (5, 6); TELEGRAPHS AND TELEPHONES (1).

IMPLIED CONTRACTS—See ESTATES OF DECEDENTS (1); EXECUTORS AND ADMINISTRATORS (1, 2).

IMPLIED WARRANTY—See FOOD (1).

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IMPRISONMENT FOR DEBT—See CONSTITUTIONAL LAW (4).

INABILITY TO PERFORM—See CONVERSION (5).

INCONSISTENT CLAIMS—See EQUITY (3).

INDEPENDENT CONTRACTOR—See MASTER AND SERVANT (37, 40).

INDICTMENT AND INFORMATION.

An information under section 15315, 3 Comp. Laws 1915, charging that defendant embezzled money belonging to another, the vendee in a land contract, was not supported by evidence showing that said money was received by defendant as the executor of the estate of the vendor, deceased, in said contract, although at the time the information was drawn the contract had been set aside by the court and a decree entered for the repayment of the money by the estate. *People* v. *Day*, 636.

INFLUENCE—See MALICIOUS PROSECUTION (3).

INJUNCTION—See ADVERSE POSSESSION (3); DRAINS (2); EXECUTION (2); MUNICIPAL CORPORATIONS (2, 13).

"INJURY"—See MASTER AND SERVANT (12, 14, 45).

INNKEEPERS.

Section 6947, 2 Comp. Laws 1915, giving the keeper of a hotel, inn, or boarding or lodging house a lien on the baggage and effects of a guest or boarder for food and lodging, *held*, from the association of the words "hotel or inn or boarding or lodging house" that the legislature had in mind business of a kindred and public nature. *Friedrich Music House* v. *Harris*, 421.

See REPLEVIN (3).

INSANE PERSONS—See CANCELLATION OF INSTRUMENTS; EQUITY (1).

INSOLVENCY—See CONTRACTS (2, 3).

INSTRUCTIONS—See APPEAL AND ERROR (19-21); CRIMINAL LAW (2); FOOD (2); FRAUD (15); RAILROADS (2, 3); RECEIVING STOLEN GOODS; TRIAL (2-4, 9, 11, 15, 16, 20, 21).

INTENT—See CONTRACTS (12, 14); CRIMINAL LAW; DISMISSAL AND NONSUIT; ELECTIONS; FRAUD (15); INNKEEPERS; MASTER AND SERVANT (12); SUBROGATION (1).

INTENTION—See WILLS.

INTEREST IN LAND—See HUSBAND AND WIFE (2).

INTERSTATE COMMERCE.

The decision of the Supreme Court of the United States that the entire subject of the liability of interstate railway

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INTERSTATE COMMERCE—Continued.

carriers for the death or injury of their employees while employed in interstate commerce is completely covered by the Federal employers' liability act (35 U. S. Stat. 65) is controlling in Michigan, rendering inapplicable the provisions of the Michigan workmen's compensation act in such cases. *New York Cent. R. Co.* v. *Winfield*, 244 U. S. 147. *Carey* v. *Grand Trunk Western R. Co.*, 12.

See MASTER AND SERVANT (1).

INTERVENERS—See PARTIES; SUBROGATION (2).

INTRASTATE COMMERCE—See MASTER AND SERVANT (1).

ISSUES—See NEW TRIAL (1); TRIAL (7, 13).

JOINT DEFENDANTS—See PROCESS.

JUDGMENT.

Where judgment had already been entered, a motion to enter judgment *non obstante veredicto* was unavailing. *Wulff* v. *Bossler*, 199 Mich. 70. *Yerkes* v. *Antrim Circuit Judge*, 444.

See MASTER AND SERVANT (41).

JUDICIAL NOTICE—See EVIDENCE (4).

JUDICIAL QUESTION—See MUNICIPAL CORPORATIONS (5).

JURISDICTION—See APPEAL AND ERROR (10, 11, 13-16); EMINENT DOMAIN (3); EQUITY (5-7); EXCEPTIONS, BILL OF (1, 2); EXECUTION (2); EXECUTORS AND ADMINISTRATORS (3); MASTER AND SERVANT (1, 4); MUNICIPAL CORPORATIONS (2, 13); PROCESS; SUBROGATION (5).

JURISDICTION OF STATE OVER LAND CEDED TO UNITED STATES—See CONSTITUTIONAL LAW (1).

JURY—See APPEAL AND ERROR (17); TRIAL (17).

JURY TRIAL—See BROKERS.

LAND CONTRACTS—See FRAUD (1, 2, 7); SPECIFIC PERFORMANCE (1, 3); VENDOR AND PURCHASER.

LANDLORD AND TENANT—See FORCIBLE ENTRY AND DETAINER; TRIAL (7, 9).

LANSING CHARTER—See ELECTIONS.

LAST CLEAR CHANCE—See STREET RAILWAYS (2).

LEGISLATIVE DISCRETION—See APPEAL AND ERROR (10).

LEGISLATIVE FUNCTIONS—See MUNICIPAL CORPORATIONS (7, 8, 10).

LEGISLATIVE POWERS—See CONSTITUTIONAL LAW (2).

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LIABILITY—See CORPORATIONS (2).

LIABILITY OF AGENT—See PRINCIPAL AND AGENT (5).

LIABILITY OF EMPLOYER—See MASTER AND SERVANT (2, 20, 25-27).

LIABILITY OF THIRD PARTY—See MASTER AND SERVANT (7).

LIENS — See INNKEEPERS; MECHANICS' LIENS; REPLEVIN (3); SUBROGATION (4, 9, 10).

LIFE TENANT—See SUBROGATION (3, 4, 8).

LIGHTS—See AUTOMOBILES (3); TRIAL (11).

LIMITATION OF ACTIONS.

1. Where the first will had been probated for more than 15 years and plaintiff waited for more than two years after learning of his rights under the second will before beginning proceedings, his right to recover, not only the lands but also funds received upon its sale, was barred by the provisions of section 12311, 3 Comp. Laws 1915. *Young* v. *Young*, 236.

2. The court of equity will usually apply the principles of a statute of limitations by analogy. *Id.*

See MASTER AND SERVANT (11, 13, 15, 33, 35, 41-48).

LIMITATION OF APPEALS—See APPEAL AND ERROR (13, 14, 16).

LOADED WEAPON—See CRIMINAL LAW (3).

LOCOMOTIVES—See FIRES.

MALICE—See MALICIOUS PROSECUTION (3).

MALICIOUS PROSECUTION.

1. In an action for malicious prosecution, three distinct propositions must be established: (1) The fact of the alleged prosecution, and that it terminated in plaintiff's favor; (2) that defendant had not probable cause; (3) that defendant acted from malicious motives. *Thomas* v. *Bush*, 224.

2. In an action for malicious prosecution, where the facts are undisputed, the want of probable cause is a question of law to be determined by the court. *Id.*

3. In an action for malicious prosecution, where the prosecuting witness has in good faith fully and fairly stated all the material facts within his knowledge to the prosecuting officer, and acted upon his advice, proof of the fact establishes a case of probable cause, negativing the inference of malice. *Id.*

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MALICIOUS PROSECUTION—Continued.

4. In an action for malicious prosecution, where plaintiff, his brother and another were arrested for the theft of a piece of hose from a water tank in defendant's farm yard, on complaint of defendant, who, after being informed of the taking of the hose and the names of the persons who took it, stated all the facts within his knowledge fully and fairly to the prosecutor, who authorized the issuance of the warrant, the fact of probable cause was established as a matter of law, although it appeared that the hose was taken by plaintiff's brother, who claimed to own it, without the knowledge of plaintiff, and the latter was discharged from custody without a trial. *Id.*

5. In such action, where all that defendant did after the issuance of the warrant was to demand the return of the hose, which he and his tenant had paid for and believed they owned, and there was no use of the warrant to attempt to extort money or effect a settlement, there was no evidence of abuse of process, and the court was not in error in directing a verdict for defendant. *Id.* 225.

MANDAMUS.

1. Where no plea has been filed to the answer and return in mandamus proceedings, according to well settled practice, and under section 4, chap. 36 of the judicature act (3 Comp. Laws 1915, § 13440), all material facts stated in said return must be taken to be admitted as true. *Yerkes* v. *Antrim Circuit Judge*, 443.

2. Statements in the answer, in mandamus proceedings, not traversed by relator, must be taken as true. *Marsh* v. *Kent Circuit Judge*, 579.

3. Mandamus will not lie to review the action of a circuit judge in extending the time for settling the record in a case for appeal, where such postponement was made necessary by relator's failure to furnish the adverse party with the stenographer's notes in compliance with section 3, Circuit Court Rule No. 66, in time to permit reasonable examination and comparison. *Id.*

See EXECUTION (1); HABEAS CORPUS (3).

MARKETABLE TITLE—See EVIDENCE (14); VENDOR AND PURCHASER (5, 9).

MASTER AND SERVANT.

1. Where claimant's husband, a conductor, was accidentally killed while in charge of a freight train composed exclusively of cars containing interstate shipments, an award of compensation under the Michigan workmen's compensation law was unauthorized, the Federal employers' liability act (35 U. S. Stat. 65) having exclusive jurisdiction, notwithstanding defendant railroad company had filed its acceptance of the Michigan act, since it would apply to cases arising in intrastate commerce only; defendant

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MASTER AND SERVANT—Continued.

being engaged in both interstate and intrastate commerce. *Carey* v. *Grand Trunk Western R. Co.*, 12.

2. Where a carpenter, who had charge of the crew of men engaged in putting up and taking down forms in which concrete was poured, and who saw, or could have seen, in the exercise of ordinary care, just what the situation was, was killed by a fall, there could be no recovery from the master under the common law. *Willis* v. *Oscar Daniels Co.*, 19.

3. Whether the workmen's compensation law (Act No. 10, Extra Session 1912, 2 Comp. Laws 1915, § 5423 *et seq.*) is applicable or not, before a master, who has not signified his intention of coming under the provisions of the law, can be held liable for the accidental death of a servant in his employ, actionable negligence on the part of the master must be proven. *Id.*

4. The proviso in Act No. 17, Public Acts 1881, ceding to the United States land for St. Mary's Falls ship canal, *held*, to be for the purpose of providing that there should be no neutral territory where civil and criminal process might not be served, and is no authority for the contention that, in the absence of legislation upon the subject by congress, the legislature of Michigan might legislate upon the subject of employers and employed, rendering the provisions of the workmen's compensation law operative over the ceded lands. *Id.* 20.

5. An employee, injured through the negligence of a third party, may pursue his common law remedy against said third party or demand compensation from his employer under the provisions of the workmen's compensation law. Section 15, part 3, Act No. 10, Extra Session 1912 (2 Comp. Laws 1915, § 5468). *Albert A. Albrecht Co.* v. *Whitehead & Kales Iron Works*, 109.

6. The election of the injured employee to take under the workmen's compensation law rather than pursue his remedy against said third party, amounted to a waiver extinguishing his common law remedy, and an assignment of it to the employer would not furnish the basis for a suit to recover compensation paid by him to the employee under said act. *Id.*

7. In an action by an employer to enforce the liability of a third party for compensati paid by the employer to an injured employee under the provisions of the workmen's compensation law, section 15, part 3, of said act creating said liability construed, and *held*, to be the intent that the employer may enforce the liability of such other person to the extent that he has paid compensation to the injured party, and no farther. *Id.*

8. On certiorari to review an award of compensation by the industrial accident board, under the workmen's compensation act, where there is competent testimony upon which

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MASTER AND SERVANT—Continued.

to base its conclusion, the award of the board will not be disturbed. *Holnagle* v. *Lansing Fuel & Gas Co.*, 132.

9. Where the undisputed testimony showed that, after a workman had served his employer for several years in the capacity of a locomotive crane operator, he left its employ on June 21, 1916, going out on a strike, and on August 24, 1916, he re-entered its service in the capacity of a mechanic, under a new contract and at a different wage, in which capacity he was serving at the time of his accidental death, on October 1, 1916, the compensation awarded by the industrial accident board under the workmen's compensation law, was properly based upon his average daily wage during the time of his second employment, he not having worked in this employment "during substantially the whole of the year immediately preceding his injury." Act No. 10, Extra Session 1912, part 2, § 11 (2 Comp. Laws 1915, § 5441). *Brown* v. *Central West Coal Co.*, 174.

10. Where the widow of a deceased employee filed a claim under the workmen's compensation act with the employer, who was subject to its provisions, such action operated as a release of the employer from all claims and demands at law (section 1, part 6, Act No. 10, Extra Session 1912, 2 Comp. Laws 1915, § 5488), and where an action was brought, based on the employer's common-law liability, the court below properly directed a verdict for the defendant. *Gray* v. *Brown & Sehler Co.*, 177.

11. The limitation provided in sections 15 and 4, part 2, of the workmen's compensation act (sections 5445, 5434, 2 Comp. Laws 1915), begins to run from the date of the accident, and not from the time of disability. *Cooke* v. *Holland Furnace Co.*, 192.

12. The word "injury," as used in said sections, having acquired in the law a well-defined and well understood meaning, it must be *held*, to have been used by the legislature as it was commonly understood, in the absence of a special definition in the act. *Id.*

13. Where claimant was injured, while in defendant's employ, by a falling bolt striking him on the head, and, after first aid by the foreman, he continued at work for nearly a year, when serious disability developed as a result of the accident, requiring an operation on the skull, and claim for compensation was not served on the employer until after the operation, although it had knowledge of the accident by its foreman and superintendent, an award of compensation and for medical and hospital services by the industrial accident board, under the workmen's compensation law, was unauthorized, the claim not having been made within the time limited in sections 15 and 4, part 2, of said act. *Id.*

14. While the words "accident" and "injury" are not synonymous, the accident produced the injury, and in point of time they are concurrent. *Id.* 193.

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MASTER AND SERVANT—Continued.

15. An award of compensation, under the workmen's compensation law, for medical and hospital services, is limited, by section 4, part 2 of the act, to the first three weeks after the accident. *Cooke* v. *Holland Furnace Co.*, *ante*, 192. *McMullen* v. *Gavette Construction Co.*, 203.

16. On certiorari to review an award of compensation by the industrial accident board, under the workmen's compensation law, the finding of the board that the death of plaintiff's decedent was the result of an accident, in the absence of fraud, if supported by the testimony, is binding upon the Supreme Court, notwithstanding conflicting medical testimony as to the cause of death. *Homan* v. *Boardman River Electric Light & Power Co.*, 206.

17. Where the evidence as to the cause of claimant's injury left it open to inference that it might have been caused by infection from a dyeing fluid, in the nature of an occupational disease, or, if caused by an accident, in the nature of an abrasion of the skin, through which the germ entered, there was no evidence as to when or how the accident occurred, in either event an award of compensation under the workmen's compensation law was unauthorized, since occupational diseases are not covered by the act, and in the second event there was no evidence of an accident on which to base the finding of the industrial accident board. *Jerner* v. *Imperial Furniture Co.*, 265.

18. To entitle an injured employee to compensation under the workmen's compensation act, the injury must arise out of, as well as in the course of, his employment. *Tarpper* v. *Weston-Mott Co.*, 275.

19. An injury to an employee, caused by his fellow employees injecting compressed air into his rectum in a spirit of fun, did not arise out of his employment so as to render the master liable under the workmen's compensation act. *Id.*

20. Where claimant, with her consent, was vaccinated, with other employees of defendant, by an official of the Detroit board of health, at the request of the board, an infection resulting from such vaccination did not arise out of her employment so as to render her employer liable under the workmen's compensation law. *Krout* v. *J. L. Hudson Co.*, 287.

21. In an action for personal injuries by an employee, who had been engaged to assist in filling two silos, received from a fall from a defective ladder leading up to a chute to the top of the silo, where plaintiff, who had been temporarily employed in sharpening a set of knives to be used in the machine, unknown to the employer entered the chute and climbed to the top of the ladder to see if his help was needed in completing the filling of the silo, when he fell and received the injuries sued upon, the question as to whether he was acting within the scope of his employment

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MASTER AND SERVANT—Continued.

was properly for the jury, under proper instructions. *Van Driel* v. *Stevens*, 291.

22. Testimony of plaintiff as to his reasons for climbing the ladder was not objectionable on the ground that it was self-serving; its weight being for the jury. *Id.*

23. Where the testimony of the physician showed that plaintiff's injury was of a permanent character, it was not error for the trial court to submit to the jury the question of his decreased earning power, although he testified that, because wages had gone up, he was able to earn, at lighter work, the same wages he received before the injury. *Id.*

24. On certiorari to review an award of compensation by the industrial accident board under the workmen's compensation act, defenses not relied upon in defendant's statement denying liability, filed in conformity with a rule of the board, and not relied upon on the hearing before the arbitration committee and on review before the full board, are not available in the appellate court. *Roach* v. *Kelsey Wheel Co.*, 299.

25. Where claimant's decedent was employed to help tear down some brick work in the superheated boiler room of defendant's plant, during very hot weather in July, and was overcome by the heat on July 24th, remaining away from work on the 25th, but returning to work on the 26th and continuing to work until the afternoon of the 27th, when he was again overcome by the heat and died the same evening, his death was not the result of an accident rendering the employer liable under the provisions of the workmen's compensation act. *Id.*

26. Before an employee is entitled to recover compensation, under the workmen's compensation law, he must establish the fact that he received an accidental injury which arose out of, and in the course of his employment. *Tackles* v. *Bryant & Detwiler Co.*, 350.

27. Where plaintiff, while performing his usual duties as a civil engineer, helped another employee to lift a heavy block of timber weighing about 200 pounds, as he was accustomed to do whenever necessary, and he did not slip or fall, nor did the timber which he was lifting strike him, and nothing out of the ordinary happened, but, while lifting, he felt a severe burning pain in his right groin, and he continued with his usual duties for a period of about ten days, when he noticed a large swelling at or about the place where he had felt the burning pain, and, on calling a physician, learned that he was suffering from an inguinal hernia, *held*, that plaintiff did not receive an accidental injury within the meaning of the workmen's compensation law. *Id.*

28. On certiorari to review an award of compensation by the industrial accident board, under the workmen's compen-

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MASTER AND SERVANT—Continued.

sation act, where the autopsy showed that death resulted from mitral regurgitation, and there was no evidence that anything unusual or fortuitous occurred, and no competent testimony upon which to base the conclusion that the death of plaintiff's decedent was the result of an accident within the meaning of the act, the award of the board will be reversed. *Guthrie* v. *Detroit Shipbuilding Co.*, 355.

29. On certiorari to review an award by the industrial accident board, under the workmen's compensation law, a finding of the board, supported by evidence, will not be reviewed. *Jacobs* v. *Glasser & Hoffman*, 473.

30. An order of the industrial accident board finding that plaintiff was entitled to compensation for partial disability from and after a certain date, at the rate of one-half the difference between his average weekly wage before and after the injury, was merely a statement of the law, of which defendants could not complain, in the absence of any evidence as to partial disability, or the fixing of any definite amount, but leaving this question to future proof. *Id.*

31. Under the workmen's compensation act, an injured employee's right to compensation is to be tested by his ability to earn at the same employment in which he was employed when injured. Section 11, part 2, Act No. 10, Extra Session 1912 (2 Comp. Laws 1915, § 5441). *Jameson* v. *Walter S. Newhall Co.*, 514.

32. An award by the industrial accident board of total disability, with the proviso that, should plaintiff become only partially incapacitated he should receive compensation at the rate of one-half the difference between his average weekly wage before the injury and the average weekly wage he is able to earn during the period of his partial disability, was justified under section 11, part 2, of the workmen's compensation act (2 Comp. Laws 1915, § 5441), where the evidence showed that plaintiff was physically incapacitated from following his former employment as an expert pile driver. *Id.*

33. An award of compensation by the industrial accident board, under the workmen's compensation law, unsupported by any evidence that the statutory notice required by section 15, part 2, of the act (2 Comp. Laws 1915, § 5445), was given by the injured employee or any one for him, or that the employer had notice or knowledge of the injury under section 18 (2 Comp. Laws 1915, § 5448), will be set aside by the appellate court on certiorari to review the award. *Herbert* v. *Lake Shore, etc., R. Co.*, 566.

34. Notice of an injury received by a yard conductor to a switchman, who was a subordinate employee, cannot be held to be notice to the employer, rendering the latter liable under the workmen's compensation act. *Id.*

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MASTER AND SERVANT—Continued.

35. Testimony of a casual conversation between the injured employee and a superior, in which the fact of injury was mentioned, the exact time of which he was unable to fix, but which was at least seven or eight months after the alleged injury, *held*, insufficient notice of the injury to bind the employer under the workmen's compensation law. *Id.*

36. Findings of the industrial accident board, unsupported by competent evidence, are not binding upon the Supreme Court. *Id.*

37. On certiorari to review an award of compensation by the industrial accident board, under the workmen's compensation act, to the widow of a painter and decorator who was accidentally killed while engaged at work for a hotel company, where the facts are undisputed, the question as to whether decedent was an employee or an independent contractor was a question of law. *Holbrook* v. *Olympia Hotel Co.*, 597.

38. It is clear that, under the workmen's compensation act (sections 5427, 5429, 2 Comp. Laws 1915), it was contemplated that there may be an employment of labor, not in the usual course of the business of the employer, in which employment the risks of injury not occasioned by the employer's fault are assumed by the workman. *Id.*

39. The owner of a hotel is not pursuing his business, within the meaning of the workmen's compensation act, when he causes the rooms to be occasionally painted and decorated, although it is usual to have work of that nature done from time to time. *Id.*

40. Where the undisputed facts show that in doing work for a hotel company in painting and decorating its rooms from time to time as occasion required, deceased engaged his own men and controlled them, doing as much or little work personally as he pleased, although the work was to be done to the satisfaction of the manager of the hotel, who furnished the materials used, and deceased was paid so much per hour for the men engaged in the work, he was an independent contractor and not an employee within the meaning of the workmen's compensation act. *Id.*

41. The decision of the committee on arbitration as to a claimant's right to compensation under the workmen's compensation act, filed with the industrial accident board, is final and stands as the decision of the board unless a claim for review is filed with the board in conformity with the provisions of section 5461, 2 Comp. Laws 1915. *Kalucki* v. *American Car & Foundry Co.*, 604.

42. Where the claim for review is not filed within the seven days limited in the statute, the showing justifying the board in extending the time, under the proviso in said section, must be such as to present some legal basis recognized as authorizing the exercise of a judicial, or *quasi*

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MASTER AND SERVANT—Continued.

judicial, function or judgment, and the board may not act arbitrarily without "good cause shown." *Id.* 605.

43. Inability to furnish the money necessary to pay the expenses of such review is not a recognized legal "good cause shown" for extending the time, especially in view of the fact that a bare statement in writing of plaintiff's claim for review, which could be written in two or three lines, would, if filed with the board within the seven days, have preserved his right of review under the provisions of the statute. *Id.*

44. Where plaintiff suffered an injury to his eye while in defendant's employ, and after treatment by its physician he continued at work, although the injury continued and finally resulted in the loss of the eye, and no claim for compensation under the workmen's compensation act was made until more than six months after the date of the accident, an award of compensation was barred by the provisions of the statute (section 5445, 2 Comp. Laws 1915). *Cooke* v. *Furnace Co.*, *ante*, 192. *Id.*

45. The limitation provided in section 15, part 2, of the workmen's compensation act (section 5445, 2 Comp. Laws 1915), begins to run from the date of the accident, and not from the time the injured employee discovers the extent of his injuries. *Cooke* v. *Furnace Co.*, *ante*, 192. *Dane* v. *Michigan United Traction Co.*, 612.

46. The provision of section 15, part 2, of the workmen's compensation act (section 5445, 2 Comp. Laws 1915), providing that "no proceedings for compensation for an injury under this act shall be maintained * * * unless claim for compensation * * * shall have been made within six months after the occurrence of the same," is a limitation affecting not only the remedy but the right of an injured employee; the condition of giving notice of a claim for compensation, controlling the right to demand the same. *Podkastelnea* v. *Railroad Co.*, 198 Mich. 321. *Schild* v. *Pere Marquette R. Co.*, 614.

47. In case of doubt as to whether an injured employee's right to recover falls within the Federal employers' liability act or the Michigan workmen's compensation act, in order to preserve the right to recover under the latter act the statutory notice must be given. *Id.* 615.

48. Where an injured employee refused compensation under the workmen's compensation act, and brought suit against the employer under the Federal employer's liability law, later submitting to a nonsuit, after which claim was made under the Michigan act, but not until after the expiration of six months from the date of the accident, an award was barred by section 15, part 2, of the act (section 5445, 2 Comp. Laws 1915). *Id.*

See CONSTITUTIONAL LAW (1); CONTRACTS (6, 7); INTERSTATE COMMERCE.

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MATERIAL REPRESENTATIONS—See FRAUD (7, 11).

MATERIALMEN—See SCHOOLS AND SCHOOL DISTRICTS (3).

MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED—See WITNESSES (4).

MEASURE OF DAMAGES—See DAMAGES (2); EMINENT DOMAIN (1, 2); VENDOR AND PURCHASER (4).

MECHANICS' LIENS.

A contractor may include in his claim of lien on a building the amount due from him for materials furnished, and it is not invalidated because another contractor, who succeeded him on the job, without notice to plaintiff, paid for same. *Kunze* v. *Jones*, 453.

See CONTRACTS (17, 18).

MEDICAL SERVICES—See MASTER AND SERVANT (13, 15).

MEETING OF MINDS—See CONTRACTS (16).

MINES AND MINING—See CORPORATIONS (1).

MINORS—See HABEAS CORPUS (2).

MISCARRIAGE OF JUSTICE—See TRIAL (19).

MISTAKE OF FACT—See SUBROGATION (1, 5, 7, 9).

MONEY DECREE—See EQUITY (6).

MONEY DEPOSITED AS SECURITY—See PLEDGES.

MORTALITY TABLES—See EVIDENCE (1).

MORTGAGES.

Rights in property which are acquired subsequent to the attaching of a mortgage lien are extinguished by the foreclosure and sale of the mortgaged property; there being no privity of contract between the holder of the rights subsequently acquired and the purchaser. *Detroit, Toledo & Ironton R. Co.* v. *Western Union Tel. Co.*, 3.

See EVIDENCE (15); REPLEVIN (1, 2); SUBROGATION; VENDOR AND PURCHASER (6).

MOTIONS—See JUDGMENT.

MOTOR VEHICLE LAW—See AUTOMOBILES (1-3).

MOTOR VEHICLES—See AUTOMOBILES.

MUNICIPAL CORPORATIONS.

1. A section of a city charter will not be given a literal construction, where such construction would lead to a manifest absurdity. *People, ex rel. Brown*, v. *Parsons*, 39.

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MUNICIPAL CORPORATIONS—Continued.

2. Penalties provided in a city ordinance for its violation may be so excessive as to give an equity court jurisdiction to restrain its enforcement. *City of Kalamazoo* v. *Kalamazoo Circuit Judge*, 146.

3. That a gas company dealt with numerous customers and that its violations of an ordinance would be numerous, does not of itself render the penalty excessive; and since the purpose of the penalty is to secure enforcement of the ordinance, if the penalty is not excessive in each particular case, it is not excessive, as a matter of law, so as to render the ordinance void. *Id.*

4. A city is not incapacitated from fixing gas rates because it is itself a user of gas and therefore a purchaser. *Id.*

5. Under section 28, art. 8, Const. 1909, providing that "the right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships," a city has the power to fix reasonable rates as a condition to the use of the streets by public utilities; the question as to the reasonableness of the condition being for the courts. *Id.* 147.

6. When a reasonable condition upon the use of the streets is imposed, a public utility may either accept or reject it; if it rejects, it may not occupy the streets, and if already in possession under an expired franchise it may be ousted. *Id.*

7. The power of a municipality to prescribe the rate at which gas shall be furnished to its inhabitants under its constitutional right to a reasonable control of its streets, is in the nature of a right to contract, and in its exercise it may not enforce its mandates by proceedings *quasi* criminal in character and penal in their nature, which is a legislative, governmental function, and, before it may be exercised, must be delegated to it in express terms or by necessary implication. *Id.*

8. The city of Kalamazoo, acting under a special charter (Act No. 475, Local Acts 1897), did not possess the power to prescribe, by an ordinance enforceable by a penalty, the rate at which gas should be furnished to its inhabitants; such power not having been delegated to it by the legislature in its charter. *Id.*

9. As to the rights of municipalities operating under home rule charters, so-called, the question is not before the court and is not considered. *Id.*

10. In proceeding to establish sewers cities must observe the charter regulations, and the different steps should be taken in the order prescribed and in strict observance of the same. *Kuick* v. *City of Grand Rapids*, 582.

11. That a sewer has been constructed for some distance in a city street does not prevent its extension and enlarge-

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MUNICIPAL CORPORATIONS—Continued.

ment, as the necessities of property owners farther out on the street may require, or the public health may demand. *Id.*

12. Property owners on the street did not own the tile and had no vested right to have the old sewer maintained. *Id.*

13. In proceedings by property owners to have declared void an assessment for a sewer tax and to enjoin the collection of the same, where the sewer was built according to the plans, under plaintiff's observation, and no one was deceived as to the nature of the actual improvement, it cannot be contended that the resolution declaring the improvement a public necessity was insufficient to confer jurisdiction because it provided for lowering the existing sewer, while in fact it was also enlarged and extended and the tile in the old part was either destroyed or used in constructing the extension. *Id.*

14. Nor could it be seriously contended that plaintiff's property was not benefited by the improvement. *Id.* 583.

15. Where the assessment was ordered by the city council to be made according to benefits, it will be presumed that the same was done, in the absence of any testimony to the contrary. *Id.*

16. The validity of the special tax roll is not affected by the fact that the council was or will be influenced, upon equitable considerations, to abate what plaintiffs would otherwise have to pay by reason of the fact that they had once paid a tax for the old sewer. *Id.*

See ADVERSE POSSESSION (3, 4); CONTRACTS (19); HIGHWAYS AND STREETS (1, 2, 7).

MUTUALITY—See CONTRACTS (2, 3, 21).

NAGGING—See DIVORCE (2).

NAME OF AGENT ON LETTER-HEADS—See PRINCIPAL AND AGENT (1).

NAMES.

In an action for damages for the breach of a contract, which plaintiff signed binding himself individually, the objection that it is not enforceable because he was doing business under an assumed or fictitious name in violation of Act No. 101, Pub. Acts 1907 (2 Comp. Laws 1915, § 6349 *et seq.*), is without force, although in the introductory paragraph the contract described him as general manager; the undisputed evidence showing that he owned and managed the business. *Jones* v. *Stainton*, 694.

See APPEAL AND ERROR (8).

NATURE OF EMPLOYMENT—See MASTER AND SERVANT (37).

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NECESSITY—See MUNICIPAL CORPORATIONS (13).

NEGLIGENCE.

1. In an action for personal injuries alleged to have been caused by the negligent starting of a bread mixing machine by defendants' agent while plaintiff was working thereon, *held*, that the issue raised by plaintiff's testimony was properly one for the jury. *Bilakos* v. *Kelley*, 125.

2. Where there was no competent evidence tending to show that, at the time plaintiff received his injury, one of the defendants was a member of the copartnership, but, on the contrary, the evidence is most convincing that he did not acquire his interest therein until more than a year thereafter, the trial court should have directed a verdict in his favor. *Id.*

3. In an action under the death act for the negligent killing of plaintiff's decedent by collision with a runaway horse frightened by collision with defendant's automobile, where the evidence shows that decedent was riding north, on a bicycle, on the east side of the street, and, because of a head wind, was riding with his head down and failed to see the horse coming, he was not, as a matter of law, guilty of contributory negligence. *Dier* v. *Voorhees*, 510.

See AUTOMOBILES (1, 3-5); FIRES (2, 3); HIGHWAYS AND STREETS (5, 6, 8); MASTER AND SERVANT (3, 21); STREET RAILWAYS; TRIAL (3, 11).

NEGLIGENCE OF THIRD PARTY—See MASTER AND SERVANT (5).

NERVOUS SHOCK—See CARRIERS.

NEW TRIAL.

1. Where the issues of fact were submitted to the jury under proper instructions, defendant's motion for a new trial on the ground that the verdict for plaintiff was against the overwhelming weight of the evidence was properly refused. *Mt. Clemens Sugar Co.* v. *Grand Trunk R. Co.*, 34.

2. A motion for a new trial on the ground of newly-discovered evidence was properly denied where the evidence was merely cumulative, was upon a question not seriously disputed and not of very great force in the case, and, if admitted, there was no reason to expect a different verdict. *Bilakos* v. *Kelley*, 125.

3. A motion for a new trial on the ground that the verdict was against the great weight of the evidence was properly denied. *Ward* v. *Carey*, 218.

4. A motion for a new trial, on the ground of newly-discovered evidence, supported by affidavits of the members of defendant's building committee that they had made a further examination of the building and had become con-

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NEW TRIAL—Continued.

vinced that their testimony given upon the trial was wrong, and that they had been deceived by the contractor and architect, was properly denied. *McMillan* v. *School Dist. No. 2, Portsmouth Tp.*, 280.

5. The court also properly denied a motion for a new trial on the ground that the verdict was against the weight of the evidence. *Id.* 281.

6. A motion for a new trial, where the record is silent as to its disposition, and there are no exceptions to any refusal to grant such motion, will not be reviewed by the appellate court. *People* v. *Williamson*, 342.

7. Where the verdict was contrary to the great weight of the evidence, the court below should have granted defendant's motion for a new trial. *Miller* v. *Detroit United Railway*, 388.

8. On motion for a new trial on the ground that the verdict was contrary to the great weight of the evidence, *held*, that the trial court was justified in denying the motion. *In re Davis' Estate*, 501.

9. In an action for personal injuries against a street car company, in which plaintiff claimed to be suffering from nervous shock, where, immediately after leaving the stand, and while another witness was being examined who stated she was a trained nurse, loud screams were heard in the corridor, and the witness was called from the stand by plaintiff's counsel, who stated "That is what I feared," and the court below refused to declare a mistrial, but submitted the case to the jury after properly instructing them to disregard the incident, the action was within the discretion of the trial court, and where it cannot be determined by the appellate court that there was an abuse of discretion resulting in a miscarriage of justice, the judgment of the court below will not be interfered with. *Goldman* v. *Detroit United Ry.*, 543.

10. A motion for a new trial because of omitted testimony was properly denied where said testimony, if received, would not have changed the result. *Moore* v. *Harneck*, 642.

11. It was not an abuse of the court's discretion to deny a motion for a new trial because of counsel's unfamiliarity with the details of the testimony, he not expecting to try the case, but only to assist. *Id.*

See FRAUD (8); TRIAL (10).

NEWLY-DISCOVERED EVIDENCE—See NEW TRIAL (2); TRIAL (10).

NON OBSTANTE VEREDICTO—See JUDGMENT; TRIAL (1).

NONPERFORMANCE—See DAMAGES (4).

NONRESIDENTS—See PROCESS.

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NOTICE—See ADVERSE POSSESSION (5); CUSTOMS AND USAGES; FRAUD (13); HIGHWAYS AND STREETS (6); MASTER AND SERVANT (33-35, 44-48); SCHOOLS AND SCHOOL DISTRICTS (3).

OCCUPATIONAL DISEASE—See MASTER AND SERVANT (17).

OPPOSITE PARTY—See WITNESSES (4).

OPTIONS—See CONTRACTS (16).

ORDINANCES—See HIGHWAYS AND STREETS (5); MUNICIPAL CORPORATIONS (2-4, 7, 8).

"OUT OF EMPLOYMENT"—See MASTER AND SERVANT (18-20, 26).

OVERSTATEMENT OF CLAIM—See MECHANICS' LIENS.

OVERWHELMING WEIGHT OF EVIDENCE—See NEW TRIAL (1).

PARENT AND CHILD—See ESTATES OF DECEDENTS (1); EXECUTORS AND ADMINISTRATORS (1); HABEAS CORPUS (2).

PAROL CONTRACTS—See VENDOR AND PURCHASER (1).

PAROL TESTIMONY—See FRAUDS, STATUTE OF (1, 2).

PARTIES.

In an action by the trustee in bankruptcy of the contractor against a school district for a balance claimed to be due, the contractor for the erection of a school house, the bondsmen of the contractor had such direct financial interest in the outcome of the litigation as to entitle them to intervene under the provisions of section 12362, 3 Comp. Laws 1915. *McMillan* v. *School Dist. No. 2, Portsmouth Tp.*, 280.

See NEGLIGENCE (2).

PARTNERSHIP—See CONTRACTS (16); CONVERSION (2); TRIAL (13).

PAYMENT—See SPECIFIC PERFORMANCE (1); SUBROGATION (4, 6-11); VENDOR AND PURCHASER (3).

PEDESTRIANS—See AUTOMOBILES.

PENALTIES—See DAMAGES (4); MUNICIPAL CORPORATIONS (2, 3).

PERFORMANCE—See BROKERS; CONTRACTS (10, 18); DAMAGES (3); SPECIFIC PERFORMANCE (3); VENDOR AND PURCHASER (8).

PERMANENT INJURIES—See EVIDENCE (1); MASTER AND SERVANT (23).

PERMISSIVE USER—See ADVERSE POSSESSION (1, 2).

PERSONAL CHARACTER—See CONTRACTS (1).

PERSONAL INJURIES—See CARRIERS; EVIDENCE (1); MASTER AND SERVANT (5, 18, 21, 23, 26, 31, 32, 45-47); NEGLIGENCE; STREET RAILWAYS (1, 3).

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PLACE OF DELIVERY—See SALES (2).

PLEADING—See AMENDMENTS; APPEAL AND ERROR (8, 18); EXECUTORS AND ADMINISTRATORS (4); FIRES (1); FRAUD (5); MANDAMUS (1).

PLEDGES.

Where money was deposited by plaintiff with an automobile sales company as security for the performance of a contract, the relation of debtor and creditor was created. *Wilcox* v. *Gauntlett*, 272.

POWER OF SALE—See VENDOR AND PURCHASER (6).

PRACTICE—See APPEAL AND ERROR (8); EXCEPTIONS, BILL OF (1, 4); LIMITATION OF ACTIONS (2); MANDAMUS; MASTER AND SERVANT (24).

PREJUDICIAL ERROR—See APPEAL AND ERROR (1, 2, 7, 17).

PRESCRIPTION—See ADVERSE POSSESSION (1, 2).

PRESUMPTIONS—See ESTATES OF DECEDENTS (1); EXECUTORS AND ADMINISTRATORS (1); MUNICIPAL CORPORATIONS (15); PRINCIPAL AND AGENT (1); SUBROGATION (6); TELEGRAPHS AND TELEPHONES (1).

PRINCIPAL AND AGENT.

1. Agency may be inferred from the fact that circulars and letter-heads of the defendant described one as its agent. *Theisen* v. *Detroit Taxicab & Transfer Co.*, 136.

2. In an action for money alleged to have been paid to defendant by plaintiff's decedent to be applied to the payment of a specific debt, evidence *held*, to sustain the finding of the jury, in answer to a special question, that defendant was not acting as agent of a third party in receiving the money. *Cutter* v. *Powers*, 375.

3. When defendant accepted the money with instructions to pay a specific debt, he was acting as the agent of plaintiff's decedent. *Id.* 376.

4. It is permissible for the agent of one party to be appointed by the adverse party as his agent for certain purposes, and each party will then stand in the relation of principal to the agent as to the matters entrusted to the agent, and as to those alone. *Id.*

5. Where a principal places money in the hands of an agent to pay a debt when ordered, and the agent refuses to obey such orders, he becomes liable to the principal, whether the instructions are violated through mistake or design. *Id.*

See EVIDENCE (8); FRAUD (6, 12-15); TRIAL (7, 8).

PRINCIPAL AND SURETY—See PARTIES; SCHOOLS AND SCHOOL DISTRICTS (3, 4).

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PRIVITY OF ACTION—See EQUITY (4).

PROBABLE CAUSE—See MALICIOUS PROSECUTION.

PROBATE COURTS—See CONSTITUTIONAL LAW (2-4); HABEAS CORPUS (1); LIMITATION OF ACTIONS (1).

PROCESS.

Where suit was commenced in plaintiff's home county against joint defendants residing in another county, and service of process was had on one of the defendants in plaintiff's home county, but no proof of service of the writ on the home defendant was made and filed with the county clerk before service was had upon the other defendants in another county, the practice was not in conformity with chapter 13, § 27, subd. 4, of the judicature act (3 Comp. Laws 1915, § 12430) and Circuit Court Rule No. 18, § 1, and therefore the court did not obtain jurisdiction, and any judgment rendered therein was void. *Engel* v. *Smith*, 395.

PROMISES—See EVIDENCE (7).

PROOF OF SERVICE—See PROCESS.

PROOF TO BE ESTABLISHED—See MALICIOUS PROSECUTION.

PROOFS—See MALICIOUS PROSECUTION (3); TRIAL (2).

PROVISO—See MASTER AND SERVANT (4).

PUBLIC BUILDINGS—See CONTRACTS (19, 20).

PUBLIC HEALTH—See MUNICIPAL CORPORATIONS (11).

PUBLIC LANDS—See ADVERSE POSSESSION (3-6).

PUBLIC OFFICERS—See CONTRACTS (8).

PUBLIC POLICY—See CONTRACTS (5, 7, 10); FRAUD (9).

PUBLIC PURPOSES—See HIGHWAYS AND STREETS (2).

PUBLIC SERVICE CORPORATIONS — See HIGHWAYS AND STREETS (1, 5, 8).

PUBLIC UTILITIES—See MUNICIPAL CORPORATIONS (5, 6).

RAILROADS.

1. In an action against a railroad company for the recovery of demurrage charges paid under protest by plaintiff, the owner of a beet sugar factory, under threat of withdrawal of defendant's switch engine and crew in case of refusal, where the evidence was conflicting as to whether delay in unloading cars during the free time allowed by the law was occasioned by plaintiff or defendant, the issue was properly submitted to the jury, and the court below was not in error in refusing to direct a verdict for de-

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RAILROADS—Continued.

fendant. *Mt. Clemens Sugar Co.* v. *Grand Trunk R. Co.*, 33.

2. Refusal of the trial court to instruct the jury that the switching service on plaintiff's spur track was "plant switching," for which defendant was not liable, was not prejudicial to defendant, where the court in his instructions withdrew from their consideration the question of damages arising from defendant's failure to switch the cars after they were placed on plaintiff's spur; such instruction being in accordance with defendant's contention, it was immaterial whether denominated "plant switching" or "terminal switching." *Id.*

3. Nor could defendant complain of the court's instruction that defendant had the right to assess demurrage upon cars consigned to plaintiff which were held at nearby stations, upon its road, because of plaintiff's inability to handle them; said instruction being in accordance with defendant's contention. *Id.* 34.

See CONTRACTS (1, 7, 11, 12); DRAINS (2); FIRES; MASTER AND SERVANT (1); TRIAL (14).

REAL PROPERTY—See FRAUD (1, 2, 7).

REASONABLE CONDITION—See MUNICIPAL CORPORATIONS (6).

REBATE—See TELEGRAPHS AND TELEPHONES (2).

REBUTTAL—See SCHOOLS AND SCHOOL DISTRICTS (2); TRIAL (12).

RECEIPT—See CONVERSION (2).

RECEIVING STOLEN GOODS.

1. In a prosecution for receiving stolen property, an instruction by the court that the place "where the offense was committed" was not in dispute, was not prejudicial error because he failed to use the word "alleged" before the word "offense." *People* v. *Mullis*, 505.

2. Undisputed testimony of a witness that he stole the goods defendant was charged with receiving, justified the trial court in instructing the jury that there was no dispute that they were stolen. *Id.*

3. Defendant having testified that the stolen goods were worth over $25, and there being no testimony to the contrary, the court was not in error in instructing the jury that it was admitted that the value was over $25. *Id.*

4. On the question of guilty knowledge of defendant, the court was not in error in charging the jury that "His possession must be regarded as innocent, unless shown to have been received with knowledge that they were stolen, or under circumstances which would satisfy the jury that he believed them to be stolen." *Id.* 506.

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RECONVEYANCE—See FRAUD (2).

RECORDING NAMES—See NAMES.

RELEASE—See ESTATES OF DECEDENTS (3, 4); MASTER AND SERVANT (10); TRIAL (8).

REMEDY, COMMON LAW—See MASTER AND SERVANT (5).

REPLEVIN.

1. In an action for machinery removed from a grape juice plant by defendant, mortgagor, where the evidence was undisputed that the mortgages upon the farm, the foreclosure of which gave plaintiff the right to possession of the realty, did not cover the personal property, which was in no way affixed to the freehold, and that, on the day the writ of replevin was issued, as between plaintiff and defendant, defendant was entitled to the possession of the property, a verdict should have been directed in his favor. *O'Dell* v. *Day*, 259.

2. Correspondence between plaintiff and defendant, after the foreclosure of the mortgages, in which defendant apparently admitted plaintiff's ownership of the personal property, cannot be construed as a surrender either of title or the right to possession of the property by the defendant. *Id.*

3. Where the evidence showed that defendant in replevin proceedings kept one or two steady boarders in her family, but without any pretense or claim of running a boarding house, she was not the keeper of a boarding house within the meaning of section 6947, 2 Comp. Laws 1915, giving the keeper of a boarding house a lien on the baggage and effects of a guest or boarder for food and lodging, and she was not entitled to hold the effects of a boarder as against the vendor who had retained title to the same. *Friedrich Music House* v. *Harris*, 421.

See TELEGRAPHS AND TELEPHONES (2).

REPRESENTATION OF FACT—See EVIDENCE (7).

REQUESTS TO CHARGE—See APPEAL AND ERROR (20).

RES GESTÆ—See EVIDENCE (10).

RES JUDICATA—See APPEAL AND ERROR (5); HABEAS CORPUS (2, 3); TRIAL (18).

RESCISSION—See CONTRACTS (21); CONVERSION (5).

RETAINING TITLE—See SALES (1).

RETRIAL—See TRIAL (18).

RETROACTIVE LEGISLATION—See APPEAL AND ERROR (12).

REVERTER—See HIGHWAYS AND STREETS (3).

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REVIEW—See APPEAL AND ERROR (1-4, 10).

RIGHT OF MASTER TO EARNINGS OF SERVANT—See CONTRACTS (6).

RIGHT OF ROAD—See NEGLIGENCE (3).

RIGHT OF WAY—See ADVERSE POSSESSION (1, 2).

RIGHT TO CANCEL—See CONTRACTS (21).

RIGHT TO FORECLOSE—See SUBROGATION (11).

RIGHT TO POSSESSION—See REPLEVIN; TELEGRAPHS AND TELEPHONES (3).

RIGHTS IN ALLEY—See HIGHWAYS AND STREETS (5).

RIGHTS IN LAND—See LIMITATION OF ACTIONS (1).

RIGHTS OF ABUTTING OWNERS—See HIGHWAYS AND STREETS (3).

RIGHTS OF MINORITY STOCKHOLDERS—See CORPORATIONS (1).

RIGHTS OF VENDEE—See VENDOR AND PURCHASER (2).

ROOMING HOUSE—See FRAUD (11-15).

RULE OF INDUSTRIAL ACCIDENT BOARD—See MASTER AND SERVANT (24).

SALE OF ASSETS—See CONTRACTS (4).

SALES.

1. Title to personal property may be retained by parol in the vendor for security until paid for, even though a note is given to evidence the indebtedness; and the vendor may sue upon the note without losing his security. *Boudeman* v. *Arnold*, 162.

2. Where part of certain building material and fixtures furnished by plaintiff to defendant for a barn were admitted to be unsuitable, without particular fault of either party, and plaintiff acquired, but had not delivered, others to replace the unsuitable ones, in a suit for the purchase price, *held*, that it was defendant's admitted right to have the new goods delivered at plaintiff's place of business, but not without first returning those for which they were to be substituted. *Hillman Hardware Co.* v. *Dietz*, 591.

3. While it cannot be told, until the experiment is made, whether the substituted parts will go with and fit those already furnished and in place, where both parties are standing upon their strict rights, and the evidence that the parts ordered are proper ones was uncontradicted, a verdict for plaintiff was properly directed by the court below. *Id.*

See CONVERSION; FRAUD (7).

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SAVING QUESTIONS FOR REVIEW—See APPEAL AND ERROR.

SCHOOLS AND SCHOOL DISTRICTS.

1. In an action against a school district for a balance claimed to be due for the erection of a school house, certificates made by the architect and the building committee of the school district were properly admitted in evidence; their value being for the jury, under proper instructions. *McMillan* v. *School Dist. No. 2, Portsmouth Tp.*, 280.

2. It was not reversible error to strike out the testimony of a witness for defendant, offered after both parties had rested, as to the cost of remedying alleged defects, testified to in their main case, in response to testimony for plaintiff that the structure was completed in accordance with the plans and specifications, although such testimony might well have been received, in the discretion of the trial judge. *Id.*

3. In an action against the sureties on the statutory bond of the contractor on a school house, evidence on the question as to whether plaintiffs were materialmen or subcontractors examined, and *held*, to support the finding of the court below that plaintiffs were materialmen, rendering immaterial the question of the sufficiency of the notice required to be given by subcontractors under section 2, Act No. 187, Pub. Acts 1905 (3 Comp. Laws 1915, § 14828). *People* v. *Valley Mantel & Tile Co.*, 554.

4. Bankruptcy of the contractor on a school building is no bar to an action by the materialmen against the sureties on the statutory bond on the ground that the amount of the liability cannot be fixed pending settlement of the bankrupt's estate, where there is no question as to the amount due plaintiffs, since by paying the judgment the defendants are legally entitled to be subrogated to plaintiffs' claim against the estate. *Id.*

See PARTIES.

SCOLDING—See DIVORCE (2).

SECURITY—See SALES (1).

SELF-SERVING TESTIMONY—See MASTER AND SERVANT (22).

SEPARATE MAINTENANCE—See DIVORCE (1).

SERVICES—See ESTATES OF DECEDENTS (1-4); EXECUTORS AND ADMINISTRATORS (2).

SETTLEMENT—See ESTATES OF DECEDENTS (3).

SETTLEMENT OF CASE FOR APPEAL—See MANDAMUS (3).

SEWERS AND DRAINS—See MUNICIPAL CORPORATIONS (10-16).

SHERIFF'S DEED—See EVIDENCE (15).

SILENCE—See FRAUD (13).

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SPARKS—See FIRES.

SPECIAL DAMAGES—See FRAUD (5).

SPECIFIC PERFORMANCE.

1. On a bill by the vendees for the specific performance of a land contract for the sale of a house and lot, where the evidence is undisputed that a $1,000 payment, credited on the contract at the date of the making, was never paid, and, as claimed by plaintiffs, was never intended to be paid, but which defendant claims was credited with the understanding that plaintiffs' father would pay it inside of two weeks; evidence as to the conflicting claims examined, and *held*, to preponderate in favor of plaintiffs and to require reversal of the decree for defendant in the court below. *Barker* v. *Finley*, 166.

2. In proceedings for the specific performance of a contract to exchange equities in land contracts, where there is an irreconcilable conflict in the testimony of the various parties, evidence examined, and *held*, to sustain the finding of the court below that plaintiff had failed to sustain his case by the burden of proof. *Zeigen* v. *Roiser*, 328.

3. Specific performance of a contract for the sale of land is not a matter of strict right, but is a question for equitable consideration, and it will not be decreed at the instance of the vendor where the contract called for a marketable title to be shown by the abstract, and the abstract showed defects which it is more or less probable might be remedied by a decree quieting title if all discoverable, recordable facts under Act No. 123, Pub. Acts 1915 (3 Comp. Laws 1915, §§ 11736-11738), were presented to a court. *Bradway* v. *Miller*, 648.

See CONTRACTS (1, 4); VENDOR AND PURCHASER (8).

STATUS QUO—See FRAUD (1, 3).

STATUTE OF FRAUDS—See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS—See LIMITATION OF ACTIONS.

STATUTES.

Where the wording of a statute is absolutely unambiguous, there is no room for construction. *In re Merrill*, 244.

See ADVERSE POSSESSION (4); APPEAL AND ERROR (8, 10, 12, 13, 14, 16); AUTOMOBILES (1-3); BROKERS; CONSTITUTIONAL LAW; CONTRACTS (19); CORPORATIONS (1); CRIMINAL LAW (2); DISMISSAL AND NONSUIT; DRAINS; EXCEPTIONS, BILL OF; EXECUTION (1); FOOD (3); FORCIBLE ENTRY AND DETAINER; FRAUD (6, 10); HABEAS CORPUS (1); HIGHWAYS AND STREETS (1, 3); INDICTMENT AND INFORMATION; INNKEEPERS; INTERSTATE COMMERCE; LIMITATION OF ACTIONS; MANDAMUS (1); MASTER AND SERVANT; MUNICIPAL CORPORATIONS (5, 8); NAMES; PARTIES; PROCESS; REPLEVIN (3); SPECIFIC PERFORMANCE (3); TAXATION (3); TRIAL (11); WITNESSES (2).

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STATUTORY BONDS—See CONTRACTS (19, 20); SCHOOLS AND SCHOOL DISTRICTS (3, 4).

STATUTORY CONSTRUCTION—See DISMISSAL AND NONSUIT; INNKEEPERS; MASTER AND SERVANT (4, 7); REPLEVIN (3); STATUTES.

STATUTORY RIGHT OF APPEAL—See APPEAL AND ERROR (10, 14).

STAY—See EXECUTION (1).

STIPULATED DAMAGES—See DAMAGES (4).

STOCK AND STOCKHOLDERS—See CORPORATIONS (1).

STREET RAILWAYS.

1. In an action for personal injuries received by the driver of a delivery wagon while attempting to cross defendant's street car tracks, where, instead of continuing across the tracks when his horse regained his feet, after a stumble, he turned and drove along the track for a distance of 45 feet before being struck by the car, when one-third of the distance traveled would have taken him safely across, his conduct was so contrary to what the average man of ordinary prudence would do under similar circumstances as to constitute contributory negligence as a matter of law. *Hildebrandt* v. *Detroit United Ry.*, 52.

2. In the absence of any evidence showing how fast the car was running, or that it could have been stopped after its motorman discovered plaintiff's danger, the claim of subsequent negligence is not sustained. *Id.* 53.

3. In an action against a street car company for personal injuries and also for injuries to plaintiff's automobile, caused by a collision with defendant's street car, where plaintiff's testimony was contradictory, and the uncontradicted testimony of defendant's witnesses showed that plaintiff was guilty of contributory negligence as a matter of law, the court below was in error in refusing defendant's motion for a directed verdict in its favor. *Miller* v. *Detroit United Railway*, 388.

See CARRIERS.

STRIKING TESTIMONY—See SCHOOLS AND SCHOOL DISTRICTS (2).

SUBCONTRACTORS — See CONTRACTS (19, 20); SCHOOLS AND SCHOOL DISTRICTS (3).

SUBROGATION.

1. Where decedent had only a life estate in land devised to her by her husband subject to a mortgage of $5,500, which she, with money from her separate estate, reduced to $3,000, and later executed a new mortgage paying the first one in full, evidence *held*, to sustain the finding of the lower court that decedent acted under a mistake of

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SUBROGATION—Continued.

fact that she was the owner of the fee, and not with the intention of making a gift to the remainderman. *Detroit, etc., Loan Ass'n* v. *Oram*, 485.

2. In equity proceedings by the mortgagee in the second mortgage to revive the first mortgage and subrogate it to the rights of the mortgagee therein, the executor of decedent's estate had such interest in the litigation as to entitle him to intervene under section 12362, 3 Comp. Laws 1915. *Id.*

3. The rule is well settled that though a life tenant is under no obligation to pay off the principal of an incumbrance, even to prevent a foreclosure sale, yet if he does so, he is entitled to call upon the remainderman for contribution, and has a lien on the property for the amount due; and that the amount for which the remainderman is liable is the amount paid less the amount of interest which would have been payable by the life tenant. *Id.*

4. While a life tenant cannot claim a lien for payments made voluntarily, with no purpose to bind the remainderman, payments made in ignorance of the real facts cannot be said to be voluntary. *Id.*

5. That the inequalities resulting from a clear mistake of fact, one of the fundamental grounds of equity jurisdiction, may be remedied by subrogation, is well supported by precedents. *Id.*

6. Where the life tenant paid a mortgage which was long overdue, in the absence of direct proof of an agreement to extend, the presumption would be that payment was demanded. *Id.* 486.

7. When the basis for subrogation is payment under a mistake of fact, usually the only essential questions are the right to pay and whether there are any intervening equities that will be prejudiced by allowing subrogation. *Id.*

8. Where the life tenant paid $2,500 on the original mortgage, then overdue, under a mistake of fact that she was the owner of the fee of the premises, and there are no intervening equities that can be prejudiced, she should, to the extent of such payment, deducting interest for the duration of her life tenancy, be subrogated to the rights of the original mortgagee, as against the remaindermen, since the latter would have been bound to pay the mortgage to protect their estate. *Id.*

9. Plaintiff, having loaned a sum of money for the express purpose of paying a prior incumbrance on the land taken as security for such loan under a mistake of fact whereby the mortgage became defective, and there being no intervening incumbrances or equities, is entitled to be subrogated to the lien of the incumbrance so discharged, to the extent of the amount paid. *Id.*

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SUBROGATION—Continued.

10. Where the second mortgage given to plaintiff was for a larger amount than the remaining incumbrance, and decedent, who was personally liable on the note and mortgage, received the benefit over and above the amount required to pay said incumbrance, her executor having intervened, equity will give plaintiff a lien on the amount to which decedent was entitled to be subrogated to pay the balance due on plaintiff's mortgage over and above the amount to which it is entitled to be subrogated. *Id.*

11. Plaintiff and intervener, as the equitable assignees of the original mortgage, should have the right to foreclose the same to enforce payment. *Id.*

See SCHOOLS AND SCHOOL DISTRICTS (4).

SUBSTITUTED GOODS—See SALES (2, 3).

SUPREME COURT RULE—See APPEAL AND ERROR (6).

SURPRISE—See FIRES (1).

TAXATION.

1. The constitutional requirement of equal taxation, the ground for refusing double or duplicate taxation, has no application in cases where the alleged double taxation was not imposed by the same sovereignty. *City of Detroit* v. *Kresge*, 668.

2. The taxation of shares of stock of a Michigan corporation, some of the property of the corporation being within and some without the State, and taxed where situated, is not double taxation. *Id.*

3. The property of a Michigan corporation owning property within and without the State is taxable to itself, and therefore the shares of such corporation are exempt from taxation under section 4002, subd. 7, 1 Comp. Laws 1915. *Id.*

See MUNICIPAL CORPORATIONS (13, 15, 16).

TELEGRAPHS AND TELEPHONES.

1. A business man who installs a telephone in his office invites the public to transact business with him by its use with knowledge of existing presumptions and inferences in the business world that usually the person answering the telephone is the person called for and is the person whom he represents himself to be. *Theisen* v. *Detroit Taxicab & Transfer Co.*, 136.

2. In an action of replevin for a telephone which defendant had ordered out, and then refused to surrender after the termination of his contract on the theory that a rebate was due him, evidence that plaintiff told defendant to go to the bank and get his rebate, *held*, not sufficient to establish a new contract. *Moore* v. *Harneck*, 642.

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TELEGRAPHS AND TELEPHONES—Continued.

3. A promise to repay money to defendant would not affect plaintiff's right to possession of the telephone on the expiration of the rental contract. *Id.*

See CONTRACTS (1); EVIDENCE (3-6).

TENDER—See APPEAL AND ERROR (4); VENDOR AND PURCHASER (3).

TERMINATION—See CONTRACTS (2, 3).

TERMINATION OF TENANCY—See FORCIBLE ENTRY AND DETAINER.

TIME—See EXCEPTIONS, BILL OF.

TIME OF PERFORMANCE—See VENDOR AND PURCHASER (1).

TIME TO PERFECT RECORD TITLE—See VENDOR AND PURCHASER (9).

TITLE TO LAND—See EVIDENCE (14); SPECIFIC PERFORMANCE (3).

TITLE TO PERSONALTY—See REPLEVIN (2).

TITLE TO STREET—See HIGHWAYS AND STREETS (2).

TOTAL DISABILITY—See MASTER AND SERVANT (32).

TRIAL.

1. In an action for fraud in the sale of lots, where the evidence was conflicting, the issue was properly for the jury, and the court below was in error in entering judgment *non obstante veredicto*. *State Security & Realty Co.* v. *Badger*, 104.

2. Where there was sufficient evidence of fraud to carry the question to the jury, an instruction by the court that the fraud should be established by clear proof, and that if there was such proof in this case that satisfied them that plaintiff was defrauded in the manner alleged, the plaintiff should be given a verdict, but if not so satisfied the defendant would be entitled to a verdict, *held*, as favorable to defendant as he was entitled to. *Id.* 105.

3. Where the evidence as to defendants' negligence and plaintiff's contributory negligence was sufficient to present a question of fact for the jury, requests to charge, which, if given, would have amounted to the direction of a verdict for defendants, were properly refused. *Bilakos* v. *Kelley*, 125.

4. A request to charge that the jury were not to take into consideration the financial condition of the plaintiff or the defendants was properly refused, in the absence of any evidence upon the question. *Id.*

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TRIAL—Continued.

5. Where the testimony is all one way, is uncontradicted by any testimony given in the case by the witnesses of either party, either on direct or cross-examination, or by any facts or circumstances in the case, is not in itself in any way improbable or discredited, and but one legitimate inference may be drawn from it, and a case is thereby made for the plaintiff or a defense made for the defendant, the duty rests upon the court to direct a verdict. *Boudeman* v. *Arnold*, 162.

6. That it is many times a difficult question to determine whether there is any testimony on a given subject, does not relieve the court from the responsibility or the duty of solving it. *Id.*

7. Where plaintiff brought suit to recover a balance of rent claimed to be owing to him by defendants, sublessees of another, conflicting testimony as to whether he was acting as principal or as agent of the lessee in the arrangement made with defendants to pay additional rent, presented a question of fact for the jury. *Gleason* v. *Stone*, 187.

8. In such action, evidence sustaining the theory of defendants that they dealt with plaintiff as agent of the lessee, and that the latter subsequently agreed to take care of the indebtedness for which suit was brought, was admissible. *Id.* 188.

9. An instruction that, if defendants agreed to pay the last month's rent, and in reliance thereon plaintiff paid it, that there would be a sufficient consideration for the promise, and defendants would be estopped to deny liability, fully protected the rights of plaintiff. *Id.*

10. Where the evidence was in sharp conflict on the material questions, the trial court did not err in refusing to direct a verdict for plaintiff, or in refusing his motion for a new trial on the ground that the verdict was against the weight of the evidence. *Id.*

11. In an action for the negligent killing of plaintiff's decedent, who was struck, on a dark and rainy night, while in a public street for the purpose of taking a street car, by an automobile driven by defendant, an instruction by the trial court that, "the automobile having the usual lights upon it at the time, there was, as a matter of law, a reasonable warning," taken in connection with his failure to instruct that defendant owed a duty to a pedestrian in a public highway to give an audible warning of his approach, amounted to reversible error. Subdivision 2, § 7, and subd. 1, § 6, Act No. 318, Pub. Acts 1909 (1 Comp. Laws 1915, §§ 4818, 4812). *Johnston* v. *Cornelius*, 210.

12. There was no error in permitting plaintiffs, in rebuttal, to contradict evidence given by defendant's witnesses. *Ward* v. *Carey*, 218.

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TRIAL—Continued.

13. Testimony of three witnesses to the fact that plaintiffs were copartners was sufficient to take the question to the jury. *Id.*

14. The court below was not in error in refusing to direct a verdict for defendant, where the evidence warranted the conclusion that defendant's engine caused the fire, although the evidence that the engine was out of order was based solely upon the testimony of experts that an engine properly equipped and managed would not emit a spark capable of setting fire at the distance in question. *Budd* v. *Ann Arbor R. Co.*, 251.

15. Where the trial judge, in his charge to the jury, taken as a whole, plainly indicated his bias, it is open to criticism. *Oceana Canning Co.* v. *King*, 269.

16. There was no error in the charge of the court, of which defendant could complain, where all of its requests were given to the jury, and the charge presented the claims of the contending parties fairly, and, as a whole, preserved the rights of defendant. *McMillan* v. *School Dist. No. 2, Portsmouth Tp.*, 280.

17. In an action for damages against the owner of an automobile, where plaintiff's counsel in the *voir dire* examination inquired of each juror if he owned an automobile, if it was insured, and if he was a member of the Citizens' Mutual Automobile Insurance Co., said examination apparently being in good faith, and counsel for defendant, after examining the jury, passed them for cause, and both sides announced themselves satisfied with the jury, and the record does not disclose that counsel for defendant exercised any of his peremptory challenges or preferred any request to charge upon the subject, any error in the examination is *held* to have been waived. *Link* v. *Fahey*, 308.

18. Where, on a former appeal, the appellate court held that a verdict for defendant had been improperly directed (184 Mich. 315), and, upon a retrial, the case in no essential feature differs from the former one, although defendant advanced a theory of independent, intervening, effective cause, which failed for lack of proof, the court below was not in error in submitting the issues to the jury, under proper instructions. *Schneider* v. *C. H. Little Co.*, 361.

19. Where there is no reversible error, and, upon the entire record, it cannot be said that the trial resulted in a miscarriage of justice, the judgment of the court below will be affirmed. *Id.* 362.

20. Improper argument of counsel as to amount of damages to be obtained in order to avoid payment of costs, was not reversible error where the court promptly instructed the jury not to consider the costs or who was going to pay them, and later covered the same question in his general charge. *Gallant* v. *Miles*, 532.

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TRIAL—Continued.

21. Improper argument of counsel in asking the jury if there was a gentleman on it "who would take that for all the money that could be given," was not so prejudicial as to require reversal of the judgment, where the court promptly instructed the jury to pay no attention to the argument, and correctly charged them as to the proper measure of damages. *Goldman* v. *Detroit United Ry.*, 543.

See APPEAL AND ERROR (5, 17, 19-21, 23, 25); BROKERS; CONVERSION (5, 6); CRIMINAL LAW (2); ESTATES OF DECEDENTS (4); EVIDENCE (9); FOOD (2); FRAUD (14, 15); NEGLIGENCE (2); NEW TRIAL (9-11); RAILROADS (2, 3); RECEIVING STOLEN GOODS; SCHOOLS AND SCHOOL DISTRICTS (2).

ULTRA VIRES—See CONTRACTS (9-11).

UNAUTHORIZED TAKING—See AUTOMOBILES (2).

UNITED STATES LANDS—See CONSTITUTIONAL LAW (1); MASTER AND SERVANT (4).

UNLICENSED CHAUFFEUR—See AUTOMOBILES (5).

VACCINATION—See MASTER AND SERVANT (20).

VALUE OF LAND—See EMINENT DOMAIN (1, 2).

VARIANCE—See AMENDMENTS; FIRES (1); INDICTMENT AND INFORMATION.

VENDOR AND PURCHASER.

1. The parties to a land contract may by oral agreement extend the time originally stipulated for the payment thereunder, and such agreement operates as a waiver of the vendor of the right to rescind or forfeit for failure of the vendee to comply strictly with its provisions providing for payment. *Bugajski* v. *Siwka*, 415.

2. Where the vendor's title to premises agreed to be conveyed by a land contract was decreed to be void in a chancery case, the vendees had the right to make terms with the holder of the legal title without forfeiting their right to recover damages for the breach of the contract to convey. *Id.*

3. Where the vendor's power to perform was rendered impossible by reason of a decree in chancery extinguishing his title, the vendees were excused from tendering payment. *Id.*

4. In an action by the vendees, for damages for the breach of a land contract, where the vendor never had any title to the premises he agreed to convey and was unable to perform, the measure of damages is the difference between the actual value of the premises at the time of the breach and the sum agreed to be paid by the terms of the contract. *Id.*

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VENDOR AND PURCHASER—Continued.

5. An agreement for a title to be shown to be marketable by an abstract thereof is good. *Bradway* v. *Miller*, 648.

6. Where the abstract shows that the title rests upon the foreclosure of a mortgage by advertisement, but does not show that the mortgage contained a power of sale, a marketable title is not shown, since a foreclosure by advertisement is valid only where the mortgage contains a power of sale. *Id.*

7. A title is not marketable which rests upon a deed which essentially misdescribes the property conveyed. *Id.* 649.

8. An agreement by the vendor in a land contract to furnish an abstract showing a marketable title is not complied with by evidence of adverse possession which might prevail in an ejectment suit or secure decree correcting the records, entitling him to specific performance of the contract. *Id.*

9. Plaintiff's request for time to perfect his record title was properly denied by the court below, in proceedings at his instance for the specific performance of a land contract in which he agreed to furnish abstract showing marketable title. Distinguishing *Schwartz* v. *Woodruff*, 132 Mich. 513. *Id.*

See FRAUD (1, 7); SPECIFIC PERFORMANCE (1, 3).

VESTED RIGHT—See APPEAL AND ERROR (12).

VOIR DIRE—See TRIAL (17).

WAIVER—See APPEAL AND ERROR (3, 6, 11, 15); CONTRACTS (3); HIGHWAYS AND STREETS (7); MASTER AND SERVANT (6); TRIAL (17); VENDOR AND PURCHASER (1).

WARNING—See AUTOMOBILES (3); TRIAL (11).

WARRANT—See CONSTITUTIONAL LAW (4).

WARRANTY—See FOOD (1, 2).

WEIGHT OF EVIDENCE—See FRAUD (8, 10); NEW TRIAL (1, 3, 5, 7, 8).

WILLS.

Where a testator by his will clearly expressed his intention that a farm should go to his daughter, referring to a deed of the farm to her which he had executed and placed in escrow, the validity of which is questioned but not determined, *held*, to be a valid devise. *Jennings* v. *Reeson*, 559.

WITNESSES.

1. In an action by a husband for the alienation of his wife's affections, the divorced wife was a competent witness as to acts of physical violence by plaintiff toward her, and

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WITNESSES—Continued.

her feeling toward, and affection for, him; the action not being instituted in consequence of adultery. 3 Comp. Laws 1915, §§ 12551, 12555. *Hendrickson* v. *Harry*, 41.

2. In such action, where the trial court, following a colloquy between court and counsel, stated he understood the divorced wife was offered as a witness for the purpose of showing acts of physical violence, and plaintiff's counsel made no suggestion that the court misunderstood the offer, the Supreme Court, on appeal, will regard the incident as an offer made and denied to prove assault upon the wife by plaintiff. *Id.*

3. The divorced wife, being a competent witness, generally, is subject to cross-examination like any other witness, except that she may not testify as to communications between herself and husband during coverture. *Id.*

4. Although the third party, for whom defendant claimed to be acting as agent, was not a party to the record, he had a pecuniary interest in the subject-matter of the litigation, and was an opposite party within the statute barring his testimony as to transactions with plaintiff's decedent. *Cutter* v. *Powers*, 376.

See CONVERSION (4); ESTATES OF DECEDENTS (6).

WORDS AND PHRASES—See MASTER AND SERVANT (12, 14).

WORK AND LABOR—See ESTATES OF DECEDENTS (1, 2).

WORKMEN'S COMPENSATION ACT—See CONSTITUTIONAL LAW (1); MASTER AND SERVANT.

WRITTEN CONTRACTS—See BROKERS; FOOD (2); FRAUD (6); FRAUDS, STATUTE OF (1, 3).

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